Supreme Court, U.S.
FILED
06-487 SEP 27 2006
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

JEFFERDS CORPORATION, D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
Petitioner

v.

JEREMIAH "BART" MORRIS,
Respondent

On Petition for Writ of Certiorari
To The Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

Brian S. Kane
Counsel of Record
Robert E. Dapper, Jr.
Erica L. Clarke
Dapper, Baldasare, Benson,
Behling & Kane, P.C.
Four Gateway Center
10th Floor
444 Liberty Avenue
Pittsburgh, PA 15222-1220
(412) 456-5555

QUESTIONS PRESENTED FOR REVIEW

1. Whether the West Virginia Supreme Court erred in disregarding this Court's longstanding mandate by holding that the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution prohibits a state from placing reasonable restrictions on nonresidents' access to its state courts?

2. Whether this Court's immediate review is necessary because the West Virginia Supreme Court's decision in this case is in conflict with decisions by the highest courts of several other states on a fundamental issue of Constitutional law, and because the West Virginia Supreme Court's decision calls into question the constitutionality of recent venue reforms enacted by other states to address the overcrowding of their courts by forum-shopping plaintiffs?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), the following list represents all of the parties to the proceeding before the Supreme Court of Appeals of West Virginia: The Petitioner is Jefferds Corporation, d/b/a Homestead Materials Handling Company, Appellee below. Petitioning separately is Crown Equipment Corporation, also an Appellee below. Jeremiah "Bart" Morris, Respondent, was the Appellant below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Homestead Materials Handling Company is a fictitious name under which Jefferds Corporation, a West Virginia corporation, does business in Virginia. No publicly held company owns 10% or more of the stock of Jefferds Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Statutory Background 4

II. Factual and Procedural Background 4

REASONS FOR GRANTING THE PETITION 7

I. The West Virginia Supreme Court's Holding Contravenes the Binding Precedent of This Court 8

II. The West Virginia Supreme Court's Decision Is In Conflict with Decisions by the Highest Courts of At Least Eight Other States 18

III. The West Virginia Supreme Court's Decision Calls Into Question the Constitutionality of Other States' Venue Statutes 25

IV. The Questions Presented in This Petition Merit This Court's Consideration Because They Are Both Important and Recurring 27

CONCLUSION 28

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Austin v. New Hampshire, 420 U.S. 656 (1975) 13

Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) 14

Canadian N. Ry. Co. v. Eggen, 252 U.S. 553 (1920) 9-13, 15

Chambers v. B&O R.R. Co., 207 U.S. 142 (1907) 15

Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929) 11-12, 15-16, 19-22

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 15

La Tourette v. McMaster, 248 U.S. 465 (1919) 9

Lunding v. New York Tax App. Trib. 522 U.S. 287 (1998) 14

Maxwell v. Bugbee, 250 U.S. 525 (1919) 9

McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230 (1934) 13, 15

Missouri *ex rel.* S. Ry. v. Mayfield, 340 U.S. 1 (1950) 12, 15-16, 19-20, 22

Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) 15, 22

Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274 (1985) 14

Sup. Ct. of Virginia v. Friedman, 487 U.S. 59 (1988) 14

Toomer v. Witsell, 334 U.S. 385 (1948) 8-9

United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984) 13-14

STATE CASES

Gore v. U.S. Steel Corp., 104 A.2d 670 (N.J. 1954) 22-23

Grovey v. Wash. Nat'l Ins. Co., 119 S.W.2d 503 (Ark. 1938) 23-24

Harvey v. Eastman Kodak Co., 610 S.W.2d 582 (Ark. 1981) 24

Johnson v. Chicago, Burlington & Quincy R.R. Co., 66 N.W.2d 763 (Minn. 1954) 24

Loftus v. Lee, 308 S.W.2d 654 (Mo. 1958) 24

Louk v. Cormier, 622 S.E.2d 788 (W. Va. 2005) 16

Mooney v. Denver & R.G.W.R. Co., 221 P.2d 628 (Utah 1950) 24

Morris v. Crown Equipment Corp., 633 S.E.2d 292 (W. Va. 2006) 1

Owens Corning v. Carter, 997 S.W.2d 560 (Tex. 1999), cert. denied, 528 U.S. 1005 (1999) 18-22

Price v. Atch[illegible]n, T. & S.F. Ry. Co., 268 P.2d 457 (Cal. 1954) (*en banc*) 24

St. Louis-San Francisco Ry. Co. v. Super. Ct., Creek County, 276 P.2d 773 (Okla. 1954) 24

Weaver v. Shaffer, 290 S.E.2d 244 (W. Va. 1980) 16

West Virginia *ex. rel.* Riffle v. Ranson, 464 S.E.2d 763 (W. Va. 1995) 18

CONSTITUTION

U.S. Const. art. IV, § 2, cl. 1 1

FEDERAL STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2101(c) 1

28 U.S.C. § 2403(b) 1

STATE STATUTES

Colo. Rev. Stat. Ann. §§ 13-20-1001 to -1004 (West 2006) 25-26

Ga. Code Ann. § 51-14-8(a) (2006) 26

La. Code Civ. Proc. Ann. art. 123(B) 26

Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (Vernon 2006) 19-21, 26

W. Va. Code § 56-1-1(c) 2-7, 16, 17

OTHER AUTHORITIES

Black's Law Dictionary (7th ed. 1999) 9

OPINIONS BELOW

The Opinion of the Supreme Court of Appeals of West Virginia is reported at 633 S.E.2d 292 (W. Va. 2006) and is reproduced at App. 1 - App. 46. The Order of the Circuit Court of Kanawha County, West Virginia (the "trial court") of September 1, 2004, in which it granted the Motion to Dismiss of Crown Equipment Corporation, is unreported and is reproduced at App. 47 - App. 51. The trial court's Order of November 24, 2004, in which it granted Petitioner's Motion to Dismiss, is unreported and is reproduced at App. 52 - App. 55. The trial court's November 29, 2004 Order Denying Plaintiff's Motion to Reconsider is unreported and is reproduced at App. 56 - App. 60.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on June 29, 2006. (App. 1.) Petitioner did not seek rehearing in the court below.

This Petition is filed within 90 days of the entry of judgment pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment of the Supreme Court of Appeals of West Virginia is invoked under 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply to this action, and Petitioner hereby affirms that the Attorney General of West Virginia has been served with a copy of this Petition pursuant to Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. art. IV, § 2, cl. 1 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

2. W. Va. Code § 56-1-1(c) provides in pertinent part:

> Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: *Provided*, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.

STATEMENT OF THE CASE

Recent decades have seen the rise of so-called "magnet jurisdictions," states and localities that have provided fertile ground for large verdicts as a result of their liberal tort laws, plaintiff-friendly procedural rules and generous juries. The courts in these jurisdictions have seen a large influx of tort cases brought by nonresident plaintiffs where neither the plaintiffs nor their causes of action have any real connection with the jurisdiction.

In recent years, the legislatures of some of these magnet jurisdictions have taken steps to curtail the influx of nonresident suits that would otherwise flood their courts.

One magnet jurisdiction that enacted such reform is West Virginia.

In 2003, the West Virginia Legislature amended the state's venue statute to bar suits by nonresident plaintiffs "unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in [the] state," or unless the plaintiff could not obtain jurisdiction against the defendant in the state where the claim arose. W. Va. Code § 56-1-1(c).

In this case, the West Virginia Supreme Court held that the 2003 amendment to the state's venue statute violated the Privileges and Immunities Clause of the United States Constitution because it purportedly operated as "categorical bar" to nonresidents who wish to sue in West Virginia, and "immunizes" resident defendants against suits by nonresidents. This decision effectively nullifies the West Virginia Legislature's effort to curtail the exploitation of the state's courts by forum-shopping plaintiffs, because it will allow nonresident plaintiffs to sue in West Virginia – without any showing that the operative acts or omissions occurred in the state – as long as they can allege some plausible claim against at least one West Virginia defendant. In the context of mass tort and product liability litigation, plaintiffs will rarely find it difficult to identify some corporation in the stream of commerce that does business in West Virginia and, on the basis of this tenuous connection with the state, assert that venue is proper in the state. In short, the West Virginia Supreme Court's decision eviscerates the Legislature's good faith effort to address a vital state issue.

It has been over fifty years since this Court has addressed a state's ability to limit the right of access to its courts by nonresidents in view of the Article IV Privileges and Immunities Clause. For that reason, and because the West Virginia Supreme Court's decision in this case jeopardizes the constitutionality of similar tort reform efforts in other magnet jurisdictions, this issue is ripe for this Court's review.

I. Statutory Background

In the proceedings below, the Respondent recognized that the West Virginia Legislature enacted Section 56-1-1(c) "to address concerns regarding over-crowding of the courts." (Br. of Appellant Morris in the W. Va. Sup. Ct. at 24.) The Respondent also conceded that "there are manifest reasons, such as convenience and administrative expense, for preferring residents in access to over-crowded courts." (Id.) Significantly, the Respondent further acknowledged:

> [T]he recent history of mass litigation in the courts of [West Virginia] which litigation [sic] certainly was a precipitating factor in the enactment of the amendment to 56-1-1. Much of the mass litigation arose from the asbestos cases brought in this State in the late 1990's and early 2000's – where there was no nexus between the plaintiffs, many of the defendants, nor this State. Dozens, and, sometimes, hundreds of non-resident plaintiffs were joined in class action lawsuits brought against foreign corporations when the plaintiffs had never been exposed to asbestos in this state, and the Defendants had virtually no connection to this jurisdiction either. . . . *Understandably, the Legislature felt some need to limit the influx of such cases. Against this backdrop, the Legislature enacted 56-1-1(c).*

(Reply Br. of Appellant Morris in the W. Va. Sup. Ct. at 2 (emphasis added).)

II. Factual and Procedural Background

This case involves a products liability action filed by Jeremiah "Bart" Morris ("Respondent"), a resident and citizen of Virginia, against Jefferds Corporation, d/b/a

Homestead Materials Handling Company[1] ("Petitioner"), a West Virginia corporation, and Crown Equipment Corporation ("Crown"), an Ohio corporation. (App. 4.) In his Complaint, Respondent alleged that he suffered a severe leg injury while operating a stand-up forklift at his place of employment in Virginia. (Id.) It was alleged that Crown designed and manufactured the forklift, which was distributed and serviced by Petitioner. (Id.) Respondent brought suit in state court in West Virginia, where Petitioner's corporate headquarters is located. (Id.)

In response to the Complaint, Petitioner and Crown each filed Motions to Dismiss based upon West Virginia Code § 56-1-1(c), which provides that a nonresident of West Virginia may not bring an action in state court in West Virginia unless all or a substantial part of the acts or omissions giving rise to the claim occurred in the state, or unless the nonresident plaintiff is unable to obtain jurisdiction over the defendant in the state where the action arose. (App. 5 - App. 7.) Because it was undisputed that Respondent was, at all relevant times, a resident of Virginia, and that the workplace accident in which Respondent was injured occurred in Virginia, Petitioner and Crown sought dismissal of the action based on improper venue. (App. 3, App. 7 - App. 8.)

In opposing the Motions to Dismiss, Respondent argued, *inter alia*, that W. Va. Code § 56-1-1(c) was unconstitutional under the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.[2] (App. 8 - App. 9.) Specifically, Respondent argued that the venue statute imposed "a categorical bar upon nonresidents

---

[1] Homestead Materials Handling Company is the fictitious name under which Petitioner operates in Virginia.

[2] Respondent also raised other constitutional arguments under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, as well as under provisions of the West Virginia Constitution. These issues were not ruled upon by the lower court, and are not at issue in the instant appeal.

of West Virginia in their access to the West Virginia courts in cases where an otherwise similarly situated resident of West Virginia would not experience such a bar." (App. 9.)

By its Orders of September 1, 2004 (App. 47 - App. 51) and November 24, 2004 (App. 52 - App. 55), the trial court effectively rejected Respondent's constitutional objection to Section 56-1-1(c) by granting the respective Motions to Dismiss. In granting Petitioner's Motion to Dismiss, the trial court expressly found that at all times relevant to the action, plaintiff was and had been a resident of the Commonwealth of Virginia, and that "the injury giving rise to this action occurred in the Commonwealth of Virginia." (App. 53.) The trial court further found that Respondent had not satisfied the requisites of Section 56-1-1(c) for bringing an action in West Virginia, where he failed to establish that all or a substantial part of the acts or omissions giving rise to his claim occurred in West Virginia, and he did not file an affidavit with his Complaint averring that he could not obtain jurisdiction over Petitioner in Virginia. (Id.)

In its conclusions of law, the trial court held that Section 56-1-1(c) was applicable and that Respondent was a "nonresident" as contemplated by the statute. (App. 53 - App. 54.) The trial court further held that whether Petitioner was a domestic or foreign corporation was not a relevant consideration under the statute. (App. 54.) Because the Respondent failed to establish by his pleadings that his cause of action had the requisite nexus with West Virginia, the court held that venue was improper in West Virginia. (Id.) The trial court subsequently denied Respondent's Motion to Reconsider.[3] (App. 56 - App. 58.)

On appeal to the Supreme Court of Appeals of West Virginia, Respondent argued that the trial court committed reversible error in failing to hold that W. Va. Code § 56-1-

---

[3] The Motion to Reconsider addressed only the Order granting Crown's Motion to Dismiss, not that of the Petitioner. (App. 56 - App. 58.)

1(c) was unconstitutional pursuant to the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. (Br. of Appellant Morris in the W. Va. Sup. Ct. at 11, 21-30.) The West Virginia Supreme Court agreed with Respondent, finding that the statute treated "nonresidency as a categorical bar" to a plaintiff's ability to bring suit in West Virginia, and holding that the statute could not constitutionally be applied in actions against resident defendants. (App. 20 - App. 21.)

Although the West Virginia Supreme Court's decision was four-to-one, the majority did not agree on its Constitutional analysis. One justice, who concurred in the result but not in its rationale, stated that "Contrary to the majority's suggestion, the Privileges and Immunities Clause does not categorically bar distinctions based upon residency for venue purposes." (App. 36 (Benjamin, J., concurring in result only).) In dissent, Justice Maynard disagreed with the majority's interpretation and application of the Privileges and Immunities Clause and argued that the term "nonresident" in Section 56-1-1(c) should have been construed so as to apply to all nonresidents, both West Virginia citizens and noncitizens, thereby preserving the constitutionality of the statute. (App. 26 - App. 30 (Maynard, J., dissenting).)

REASONS FOR GRANTING THE PETITION

This Court's seminal opinions on the Privileges and Immunities Clause have consistently limited the constitutional protections of the clause as applied to the right of access to state courts. These limitations and their underlying rationale were disregarded by the Supreme Court of Appeals of West Virginia, whose holding in this case is in direct conflict with this Court's longstanding mandate. In addition, this Court's review is warranted because the West Virginia Supreme Court's decision in this case creates a clear conflict with decisions by the highest courts of at least eight other states. Certiorari is also necessary because failure to

review the West Virginia Supreme Court's decision jeopardizes the constitutionality of other states' statutory venue reforms. Given the recent trend by which state courts and legislatures have sought to limit access to their courts by forum-shopping plaintiffs, this issue is both important and likely to recur.

I. The West Virginia Supreme Court's Holding Contravenes the Binding Precedent of This Court.

This Court has historically recognized that a citizen's right to access the courts of sister states is not absolute under the Privileges and Immunities Clause, and that states may reasonably restrict nonresidents' access to their courts. In holding that the West Virginia Legislature could not constitutionally prefer its own residents in accessing its state courts, the Supreme Court of Appeals of West Virginia disregarded the binding precedent of this Court.

In Toomer v. Witsell, this Court declared that the purpose of the Article IV Privileges and Immunities Clause was "to insure to a citizen of State A who *ventures into* State B the same privileges which the citizens of State B enjoy." 334 U.S. 385, 395 (1948) (emphasis added).

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus, the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be

> conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Id. at 396.

This Court has historically recognized a distinction between residence and citizenship in the Privileges and Immunities analysis. For example, in La Tourette v. McMaster, the Court stated that the words "resident" and "citizen" may be used in their "ordinary legal sense, which is well defined and understood, making a distinction which is substantial in its purpose and one that is sanctioned by the highest judicial authority." 248 U.S. 465, 470 (1919). Similarly, in Maxwell v. Bugbee, the Court held that a New Jersey taxing statute did not violate the Privileges and Immunities Clause because any discrimination in the statute was based upon residence and not upon citizenship. 250 U.S. 525, 538-39 (1919). The term "citizen" is commonly understood to mean "a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections." Black's Law Dictionary 237 (7th ed. 1999). The term "resident," on the other hand, means "a person who has a residence in a particular place. A resident is not necessarily either a citizen or a domiciliary." Id. at 1311. The term "residence" refers to "the act or fact of living in a given place for some time. . . . Residence usually just means bodily presence as an inhabitant in a give place." Id. at 1310.

The commonly understood legal distinction between residence and citizenship was highlighted in a trilogy of Supreme Court cases addressing the right of access to courts *vis à vis* the Privileges and Immunities Clause.

In the leading case of Canadian N. Ry. Co. v. Eggen, this Court considered the constitutionality of a Minnesota statute of limitations that barred tort suits by nonresidents when the suit would be time-barred in the jurisdiction where

the tort actually occurred, but would not bar suits by Minnesota residents under the same circumstances. 252 U.S. 553, 558-59 (1920). Eggen involved a personal injury action in Minnesota by a nonresident arising out of an accident which occurred outside of Minnesota. Id. at 559. The issue on appeal was whether the statute of limitations was repugnant to the Privileges and Immunities Clause in Article IV of the Constitution. Id.

The Eggen court recognized that "the right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of another [state]" is a fundamental privilege protected by Article IV, Section 2. Id. at 560. The Court held, however, that the Privileges and Immunities Clause does not guarantee a nonresident "precisely the same rights in the courts of a state as resident citizens have." Id. at 561. The Court reasoned,

> From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to their courts, which have not been imposed upon resident citizens.
>
> . . . .
>
> . . . [T]he constitutional requirement [of the Privileges and Immunities Clause] is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens.

Id. at 561-62. In other words, a nonresident is not denied his constitutional privilege of resorting to the courts of another state when he is given access to them under reasonable terms. See id. at 562. The Eggen Court held that because the Minnesota statute "gave to the nonresident respondent free

access to its courts . . . [for] as long a time as was given him for that purpose by the laws under which he chose to live and work . . . the privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law." Id. at 563.

In a subsequent decision, this Court upheld a New York statute which granted a preference in access to its courts based on state residency. Douglas v. New York, N.H. & H.R. Co., 279 U.S. 377 (1929). Douglas involved a personal injury suit in New York by a citizen and resident of Connecticut against a Connecticut corporation doing business in New York, arising out of an accident in Connecticut. Id. at 385. The trial court had dismissed the action based on a New York statute which placed restrictions on nonresidents' ability to sue foreign corporations in the state. See id. at 385-86.

On appeal, the plaintiff argued that the statute unconstitutionally discriminated between citizens of New York and citizens of other states "because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York." Id. at 386. Rejecting plaintiff's argument, the Douglas Court stated:

> [H]owever often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship[,] there is nothing to prohibit the legislature from using "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality[,] we presume that the Courts of New York would construe it in that way . . . ."

Id.

Construing the word "resident" in its "strict primary sense" to apply to both citizens of New York and citizens of other states, the Douglas Court found "[t]here is no discrimination between citizens as such, and none between nonresidents with regard to these foreign causes of action. *A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence.*" Id. at 387 (citations omitted) (emphasis added). In upholding the New York statute, the Douglas court explicitly recognized that "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." Id.

In Missouri *ex rel.* S. Ry. v. Mayfield, two suits were brought in state court in Missouri under the Federal Employers Liability Act, where the plaintiffs were not residents of Missouri, the defendant was a foreign corporation, and the accident giving rise to the claim occurred outside of Missouri. 340 U.S. 1, 2 (1950). At issue on appeal was whether the doctrine of *forum non conveniens* could be invoked to dismiss the cases. Id. at 3.

The Mayfield court acknowledged that the Privileges and Immunities Clause of Article IV, Section 2 would prohibit Missouri from allowing suits by nonresident Missouri citizens while discriminatorily denying access to its courts by nonresident noncitizens. Id. at 3-4. "But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control." Id. at 4. Thus, the Court held that Missouri was free to decide the availability of the doctrine of *forum non conveniens*, taking into account the nonresidency of the plaintiffs, in the FELA suits at issue. See id. at 5.

Two principles emerge from the Eggen-Douglas-Mayfield trilogy of cases. First, it is clear that this Court has recognized a valid distinction between residency and

citizenship in Privileges and Immunities cases involving the right of access to courts.[4] Second, as between residents and nonresidents, the rule has historically been one of substantially similar rights, rather than one of identical rights. Eggen, 252 U.S. at 562 (The Privileges and Immunities Clause "is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, *even though they may not be technically and precisely the same in extent as those accorded to resident citizens*.") (emphasis added). See also McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233 (1934) (the Clause "requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens").

In recent decades, this Court has adopted a two-prong analysis in applying the Privileges and Immunities Clause to any claimed instance of discrimination against out-of-state residents. See United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 218 (1984). First, the court must decide whether the statute or other law at issue burdens one of the privileges and immunities protected by the Clause. Id. On this issue, only those privileges which are

---

[4] In modern privileges and immunities jurisprudence, the distinction between the terms citizen and resident has been discounted. See Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975) ("For purposes of analyzing a taxing scheme under the Privileges and Immunities Clause the terms 'citizen' and 'resident' are essentially interchangeable."); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 216 (1984) (stating, in a case involving the right to pursue a livelihood, that "the terms 'citizen' and 'resident' are 'essentially interchangeable' for purposes of analysis of *most* cases under the Privileges and Immunities Clause") (citations omitted) (emphasis added). These cases do not reflect, however, an absolute rejection of the distinction between residence and citizenship in *all* Privileges and Immunities cases. Moreover, these cases are distinguishable from the instant case in that they did not involve the right of access to courts.

"fundamental" or which are "sufficiently basic to the livelihood of the nation" will generally fall within the purview of the Clause. Id. at 218, 221. For example, the right to pursue one's livelihood is protected, but the right to hunt big game is not. Compare Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274, 281 (1985) (right to practice one's occupation is protected), with Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978) (right to hunt elk in Montana not protected).

If it is determined that a privilege does fall within the scope of the Clause, the second step of the inquiry requires a determination of whether there is a "substantial reason" for the difference in treatment. See Mayor of Camden, 465 U.S. at 222. "The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." Id. In all cases, the court must give "due regard [to] the principle that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures." Id. at 222-223. Accord Piper, 470 U.S. at 284 (discrimination against nonresidents permissible where "there is a substantial reason for the difference in treatment" and the discrimination "bears a substantial relationship to the State's objective"); Sup. Ct. of Virginia v. Friedman, 487 U.S. 59, 65 (1988) ("[I]f the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest."). See also Lunding v. New York Tax App. Trib. 522 U.S. 287, 298 (1998) (Privileges and Immunities Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it").

In this case, the West Virginia Supreme Court erred by failing to apply the second part of the two-prong analysis mandated by Mayor of Camden and its progeny, by failing to recognize the continuing validity of the distinction between residence and citizenship in access to courts cases, and by

failing to follow the mandate of the Eggen-Douglas-Mayfield trilogy.[5]

With respect to the two-step Privileges and Immunities analysis established by this Court's recent jurisprudence, Petitioner does not dispute the West Virginia Supreme Court's conclusion that the right of access to state courts is one of the "privileges" protected by the Privileges and Immunities Clause. See Chambers v. B&O R.R. Co., 207 U.S. 142, 148 (1907); McKnett, 292 U.S. at 233. The West Virginia Supreme Court, however, ignored the second prong of the analysis, giving no consideration whatsoever to whether there was a "substantial reason" for the venue statute's difference in treatment between residents and nonresidents, or whether the degree of discrimination bears a close relation to such reason. Such analysis leads inexorably to the conclusion that the venue statute is closely related to a substantial state interest – that is, preserving the scarce resources of the state's courts for those plaintiffs and those claims that bear some reasonable connection to the state.[6]

The Respondent himself acknowledged that subsection (c) of the venue statute "was added to address concerns regarding over-crowding of the courts" and that "there are manifest reasons, such as convenience and

---

[5] These cases remain precedential notwithstanding more recent Privileges and Immunities cases involving "privileges" other than the right of access to courts. Indeed, this Court has cautioned that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

[6] In Gulf Oil Corp. v. Gilbert, this Court acknowledged that the problem of forum shopping "is a very old one affecting the administration of courts as well as the rights of litigants," and that plaintiffs' abuse of venue inevitably creates "[a]dministrative difficulties . . . for courts when litigation is piled up in congested centers instead of being handled at its origin." 330 U.S. 501, 507-08 (1947). "There is a local interest in having localized controversies decided at home." Id. at 509.

administrative expense, for preferring residents in access to over-crowded courts." (Br. of Appellant Morris in the W. Va. Sup. Ct. at 24.) Significantly, the Respondent also expressly recognized that the 2003 amendment to Section 56-1-1 was precipitated by West Virginia's recent history of mass litigation, where neither the plaintiffs nor their causes of action bore any reasonable relationship to the state. (See Reply Br. of Appellant Morris in the W. Va. Sup. Ct. at 2.) The restrictions on nonresident suits in Section 56-1-1(c) are not only reasonable, they are also closely related to West Virginia's substantial interest in conserving its scarce judicial resources and curtailing the exploitation of its courts by plaintiffs with no real interest in the state other than its liberal tort laws and generous juries. Therefore, the West Virginia venue statute does not violate the Privileges and Immunities Clause.

The West Virginia Supreme Court also erred in equating residence with citizenship in invalidating the statute. (App. 7 - App. 8 n.2, App. 18, App. 20.) The court should have followed the approach set forth by this Court in Douglas and Mayfield, and construed the word "nonresident" in its "strict primary sense" to apply to both nonresident citizens of West Virginia and nonresident citizens of other states.[7] Even the Respondent recognizes that such a construction would

---

[7] The West Virginia Supreme Court also deviated from its own precedent, where it has expressly adopted a "doctrine of least intrusive remedy" in construing statutes that may be constitutionally infirm, so as to give the statute an interpretation which will cure the constitutional defect and save it from invalidation. See Weaver v. Shaffer, 290 S.E.2d 244, 249-51 (W. Va. 1980.) In Louk v. Cormier, the West Virginia Supreme Court stated:

> In considering the constitutionality of a legislative enactment . . . [e]very reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy.

622 S.E.2d 788, 792 (W. Va. 2005).

preserve the constitutionality of the statute. (See Reply Br. of Appellant Morris in the W. Va. Sup. Ct. at 3 ("[A]ll the Legislature had to do to make the new statute valid under the Privileges and Immunities Clause was to impose the restrictive language upon both West Virginia citizens who reside outside the state and citizens of other states.").)

The West Virginia Supreme Court further erred in interpreting Section 56-1-1(c) as effecting a "categorical exclusion" of nonresidents from West Virginia courts. (App. 18 - App. 20.) The statute does not "categorically bar" *all* nonresident suits. To the contrary, it permits nonresident suits where the cause of action accrued in West Virginia or where the plaintiff is unable to obtain jurisdiction over the defendant in the state where the claim arose. W. Va. Code § 56-1-1(c). Plainly, only those cases entirely lacking any reasonable connection to the state are barred under the statute.

Finally, the West Virginia Supreme Court erred when it paradoxically adopted a construction of the venue statute that in no way addresses its perceived Constitutional infirmity. Specifically, the court held that under the Privileges and Immunities Clause, Section 56-1-1(c) cannot be applied to cases involving West Virginia *defendants*, finding that the statute "would [otherwise] categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident." (App. 19.) This construction is erroneous. The statute does not "categorically immunize" West Virginia defendants against suits by nonresidents, but rather, subjects them to suits by nonresidents when the cause of action arose in West Virginia or when the defendant is not subject to the jurisdiction of the state where the claim accrued. More importantly, Section 56-1-1(c) says nothing about the residence of the defendant. The West Virginia Supreme Court's constitutional "remedy" in this case was to rewrite the statute – an abandonment of all

rules of statutory interpretation and judicial restraint.[8] Even more remarkably, the statute as rewritten by the court entirely fails to address the *perceived* unconstitutional discrimination based on the residence of the *plaintiff*. This Court should intervene to correct the West Virginia Supreme Court's errors, lest other states adopt West Virginia's misguided interpretation of the Privileges and Immunities Clause.

II. The West Virginia Supreme Court's Decision Is In Conflict with Decisions by the Highest Courts of At Least Eight Other States.

Certiorari is warranted not only because the decision below is irreconcilable with this Court's precedent, but also because it is contrary to decisions by the highest courts of at least eight other states, including Texas, New Jersey, Arkansas, California, Minnesota, Missouri, Oklahoma and Utah.

In Owens Corning v. Carter, the Supreme Court of Texas considered the constitutionality of the Texas *forum non conveniens* statute *vis à vis* the Privileges and Immunities

---

[8] The West Virginia Supreme Court of Appeals previously held, in West Virginia *ex. rel.* Riffle v. Ranson, that "the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it." 464 S.E.2d 763, 768 (W. Va. 1995). Further espousing on the role of the Legislature in proscribing venue, the Riffle court stated,

> Where . . . there are plausible reasons for . . . [legislative] action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay[s] the legislative decision," because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

Id. at 769 n.10 (citations omitted).

Clause of the United States Constitution. 997 S.W.2d 560 (Tex. 1999), cert. denied, 528 U.S. 1005 (1999). In Carter, nonresident plaintiffs brought lawsuits in Texas against Owens Corning and other defendants for personal injuries resulting from asbestos exposure that occurred outside of Texas. Id. at 565. Owens Corning moved for dismissal of the claims under the Texas *forum non conveniens* statute, which provides that only claims by nonresidents are subject to *forum non conveniens* dismissal. Id. at 566-67. See also Tex. Civ. Prac. & Rem. Code Ann. § 71.051(e) (Vernon 2006). In response, the plaintiffs challenged the constitutionality of the statute under the Privileges and Immunities Clause – a challenge that the trial court rejected. Id. at 567.

On appeal to the Texas Supreme Court, the plaintiffs argued that Section 71.051 violated the Privileges and Immunities Clause "because, although it allows a court to dismiss a foreign plaintiff's claim under the doctrine of forum non conveniens, it does not permit a court to dismiss a claim if the plaintiff is a Texas resident." Id. at 568. In rebuttal, Owens Corning asserted that Section 71.051 passed constitutional muster because it discriminated based on residency rather than citizenship, and was therefore "legally indistinguishable" from the statute upheld by this Court in Douglas. Id.

The Texas Supreme Court cited this Court's 1950 Mayfield decision for the proposition that a state may constitutionally prefer its own residents in access to its often overcrowded courts while denying such access to all nonresidents. Id. at 569. The Carter court continued:

> Relying on *Douglas* and *Mayfield*, many courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action

> brought by a citizen of the forum state in the same circumstances. A particular state may apply the doctrine of forum non conveniens, as long as it is applied to citizens and noncitizens alike. Accordingly, Texas might violate the Privileges and Immunities Clause by choosing to apply the doctrine of forum non conveniens to nonresident nonTexans while exempting nonresident Texans from its application.

Id. Thus, the Texas Supreme Court construed Douglas and Mayfield to mean that Section 71.051 could not discriminate on the basis of citizenship *per se*, but could discriminate solely on the basis of residence without running afoul of the Privileges and Immunities Clause. See id.

The plaintiffs in Carter argued that the statutory definition of "legal resident" in Section 71.051[9] was broad enough so as to preclude dismissal of a claim brought by a nonresident Texas citizen but allow dismissal of the same claim if brought by a nonresident noncitizen. Id. The Texas Supreme Court disagreed, finding that this Court had considered and rejected a similar argument in Douglas, where the plaintiffs had contended that although the New York statute at issue used the term "nonresident," it effectively discriminated on the basis of citizenship. Id. at 570.

"[T]he Supreme Court [in Douglas] construed the term 'resident' in a strict primary sense of 'one actually living in the place for the time, irrespective even of domicile.'" Id. So construed, "[t]here [was] no discrimination between citizens as such, and none between

---

[9] The statute defines a "legal resident" as "an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences . . . ." Tex. Civ. Prac. & Rem. Code Ann. § 71.051(h)(1).

nonresidents with regard to the[] foreign causes of action." Id. (alteration in original).

> The crux of Plaintiffs' argument is that, unlike the statute in *Douglas*, a Texas citizen temporarily residing in Alabama but simply intending Texas to be his permanent home may take advantage of section 71.051(e). Owens Corning contends that the statutory definition of "legal resident" . . . is not equated with Texas citizenship; instead, the definition of "legal resident" in section 71.051 may be construed to exclude nonresident Texas citizens, thereby treating them the same as nonresident noncitizens. Owens Corning contends that we are obligated to construe the statute in this manner to avoid constitutional infirmities. We agree.

Id. (citations omitted).

Construing section 71.051 so as to avoid any constitutional infirmity, the Texas Supreme Court accepted the commonly understood meaning of the term "residence" as "the '[p]lace where one actually lives or has his home.'" Id. at 571 (quoting Black's Law Dictionary 907 (abr. 6th ed. 1991)). "Thus, a permanent residence in Texas requires a home and fixed place of habitation to which a person intends to return when away. . . . So construed, section 71.051 does not discriminate between nonresident citizens and nonresident noncitizens." Id.

The plaintiffs in Carter also urged that Douglas was inapposite because it relied on a now "discarded" distinction between residents and citizens. Id. In support of their argument, the plaintiffs cited a number this Court's cases decided after Douglas in which the Court "stated that the distinction is largely irrelevant for purposes of the Privileges and Immunities Clause." Id. Rejecting this argument, the Texas Supreme Court stated that "[a]lthough Plaintiffs are correct that modern privileges and immunities law differs

from that in *Douglas*, . . . and the distinction between residents and citizens is in disfavor in most contexts, we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court." Id. (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (alteration in original)). The Carter court further noted that "courts continue to rely on *Douglas*, despite later developments in privileges and immunities jurisprudence. Moreover, *Mayfield*, which reiterated the holding in *Douglas*, was decided after the so-called 'modern' privileges and immunities analysis was adopted." Id. Accordingly, the Texas Supreme Court held that the residency-based exemption in the Texas *forum non conveniens* statute did not violate the Privileges and Immunities Clause of the U.S. Constitution. The Supreme Court of West Virginia's decision in this case is clearly in conflict with the decision of the Texas Supreme Court in Carter.

The West Virginia Supreme Court's decision is also in conflict with the decision of the Supreme Court of New Jersey in Gore v. U.S. Steel Corp., 104 A.2d 670 (N.J. 1954). The facts of Gore are quite similar to those of the case at bar. In Gore, the defendant, U.S. Steel, was a New Jersey corporation operating a branch in Alabama. Id. at 671. The plaintiffs' decedent, an Alabama resident, had been performing work at U.S. Steel's Alabama location when he suffered severe injuries resulting in his death. Id. His family sued U.S. Steel in state court in New Jersey for negligence and wrongful death. Id.

U.S. Steel sought dismissal of the action under the doctrine of *forum non conveniens*, asserting that the plaintiffs were residents of Alabama, that U.S. Steel was subject to process in Alabama, that the accident occurred in Alabama,

that Alabama law would apply, and that all of the witnesses to the accident were residents of Alabama not subject to process in New Jersey. Id. at 671-72. Plaintiffs had apparently chosen New Jersey as the forum for their action because they believed a New Jersey jury would be more inclined to award a large verdict than an Alabama jury. See id. at 672. The trial court denied the motion to dismiss and U.S. Steel appealed. Id. On appeal, the plaintiffs argued that they had an absolute right, guaranteed by the Privileges and Immunities Clause, to maintain their action in New Jersey, particularly because the defendant was a New Jersey corporation. See id.

The New Jersey Supreme Court stated, "[i]t is now well recognized that the dismissal of a nonresident's action under principles of Forum non conveniens in nowise violates the privileges and immunities clauses of the federal constitution." Id. at 675. The Gore court agreed with U.S. Steel that "New Jersey has no real connection with the controversy although the defendant is a New Jersey corporation," and that plaintiffs' expectation of receiving a higher verdict in New Jersey was not "a persuasive or even legitimate reason for burdening metropolitan communities with litigious controversies which arose elsewhere and should in all justice be tried there." Id. at 676-77. Accordingly, the court reversed the trial court and directed that the action be dismissed. Id. at 677. The New Jersey Supreme Court's decision in Gore is in conflict with that of the West Virginia Supreme Court in this case because the New Jersey court found that the mere fact that U.S. Steel was incorporated in New Jersey did not give the Gore plaintiffs a constitutional right to maintain their action in New Jersey, whereas the West Virginia court clearly held that Petitioner's mere incorporation in West Virginia gave the nonresident Respondent a constitutional right to assert venue in West Virginia.

Other state supreme courts have issued holdings consistent with those of Texas and New Jersey. Compare

Grovey v. Wash. Nat'l Ins. Co., 119 S.W.2d 503, 505, 507 (Ark. 1938) (holding that it did not violate the Privileges and Immunities Clause for a state court to refuse jurisdiction of an action between nonresidents based on a cause of action arising outside of the state), and Harvey v. Eastman Kodak Co., 610 S.W.2d 582, 585 (Ark. 1981) (reaffirming Grovey), and Price v. Atchison, T. & S.F. Ry. Co., 268 P.2d 457, 459-60 (Cal. 1954) (*en banc*) (holding that the state could choose to prefer its own residents in access to its courts and to deny access to all nonresidents, both citizens and noncitizens), and Johnson v. Chicago, Burlington & Quincy R.R. Co., 66 N.W.2d 763, 767, 776 (Minn. 1954) (holding that so long as nonresident citizens and nonresident noncitizens are treated alike, a venue rule providing for dismissal of a nonresident's transitory action did not run afoul of the Privileges and Immunities Clause), with Loftus v. Lee, 308 S.W.2d 654, 657 (Mo. 1958) (construing the term "nonresident" to embrace citizens of Missouri who did not actually live in Missouri, and holding that dismissal of a nonresident plaintiff's action arising out of an accident which occurred in another state would not violate the Privileges and Immunities Clause), and St. Louis-San Francisco Ry. Co. v. Super. Ct., Creek County, 276 P.2d 773, 777, 779 (Okla. 1954) (dismissal of nonresident plaintiffs' actions for torts that occurred outside of the state did not violate the Privileges and Immunities Clause because a state could constitutionally prefer residents in access to its overcrowded courts and "deny such access to all non-residents, whether its own citizens or those of other states"), and Mooney v. Denver & R.G.W.R. Co., 221 P.2d 628, 646-47 (Utah 1950) (holding that a *forum non conveniens* dismissal based on the nonresidency of the plaintiff and the fact that the cause of action arose outside of the state did not violate the Privileges and Immunities Clause).

Certiorari is necessary in this case to resolve the conflict between the West Virginia Supreme Court's decision and those of the highest courts of these eight other states.

III. The West Virginia Supreme Court's Decision Calls Into Question the Constitutionality of Other States' Venue Statutes.

In recent years, several states have enacted statutory venue reform similar to that of West Virginia. If the Privileges and Immunities analysis of the West Virginia Supreme Court in this case is accepted, it calls into question the constitutionality of the statutes enacted by other magnet jurisdictions for the purpose of limiting the influx of tort claims by forum-shopping nonresident plaintiffs.

In 2004, the Colorado Legislature enacted a *forum non conveniens* statute, codified at Colo. Rev. Stat. Ann. §§ 13-20-1001 to -1004 (West 2006). Known as the "Colorado Citizens' Access to Colorado Courts Act," the statute provides that a state court may dismiss an action if the plaintiff is not a resident of Colorado and the injury or damage allegedly suffered occurred outside of Colorado. See id. §§ 13-20-1001, -1004.[10] The Colorado Legislature

---

[10] In pertinent part, Section 13-20-1004 provides:

> (1) In any action otherwise properly filed in a court of this state, a motion to dismiss without prejudice under the doctrine of forum non conveniens shall be granted if:
>
> (a) The claimant or claimants named in the motion are not residents of the state of Colorado;
>
> (b) An alternative forum exists;
>
> (c) The injury or damage alleged to have been suffered occurred outside of the state of Colorado;
>
> (d) A substantial portion of the witnesses and evidence is outside of the state of Colorado; and
>
> (e) There is a significant possibility that Colorado law will not apply to some or all of the claims.
>
> (2) In any action otherwise properly filed in a court of this state, a motion to dismiss without prejudice under the doctrine of forum non conveniens may be granted if the court finds that the factor specified in

enacted the statute based upon its findings that "[t]he courts of this state are overworked and subject to overloaded dockets," and that "[c]ases filed by nonresidents of Colorado and having no meaningful relationship to this state are clogging the dockets of the courts and causing delays in cases filed by residents of Colorado." Id. § 13-20-1002. Thus, the purposes of the statute were to "ensure access of Colorado citizens to the courts of Colorado" and to "avoid burdening the courts of this state with cases involving injuries suffered outside of the state that may be resolved elsewhere." Id. There does not appear to be any appellate case law addressing the constitutionality of the Colorado Citizens' Access to Colorado Courts Act; however, acceptance of the West Virginia Supreme Court's decision in this case imperils the constitutionality of the Colorado statute under the Privileges and Immunities Clause.

By way of further example, Texas has a statute which provides that actions by nonresidents, but not actions by residents, are subject to *forum non conveniens* dismissal. Tex. Civ. Prac. & Rem. Code Ann. § 71.051(b), (e) (Vernon 2006). Louisiana's *forum non conveniens* statute is similar to that of Texas, where the statute exempts Louisiana domiciliaries from application of *forum non conveniens*, while a plaintiff not domiciled in Louisiana and whose cause of action arose outside of the state is subject to a *forum non conveniens* dismissal. See La. Code Civ. Proc. Ann. art. 123(B). Georgia has also taken steps to curtail tort claims by nonresidents. In 2005, the Georgia Legislature enacted a statute providing that an asbestos claim cannot be brought in

---

paragraph (a) of subsection (1) of this section is present and that at least one or more but fewer than all of the factors specified in paragraphs (b) to (e) of subsection (1) of this section are present, and based upon such factors, the court finds that in the interest of judicial economy or for the convenience of the parties, a party's claim or action should be heard in a forum outside of Colorado.

a Georgia state court unless the plaintiff is a resident of Georgia or the asbestos exposure occurred in Georgia. See Ga. Code Ann. § 51-14-8(a) (2006).

Without this Court's review, the constitutionality of recent venue reforms enacted by other states is jeopardized by the West Virginia Supreme Court's holding in this case. Therefore, certiorari is appropriate.

IV. The Questions Presented in This Petition Merit This Court's Consideration Because They Are Both Important and Recurring.

It appears that, with the exception of Texas, the statutory venue reforms described in the foregoing discussion have yet to meet constitutional challenge in the states' appellate courts. However, the decision by the West Virginia Supreme Court in this case may well provide the impetus for such challenges. The questions presented in this Petition are important because of the recent trend in magnet jurisdictions to enact statutory venue reform in order to curb the abuse of their state courts by nonresident plaintiffs whose claims have no meaningful nexus with the chosen forum. In addition, the questions presented herein are likely to recur as the application of these reformed venue statutes lead to Constitutional challenges in the state courts.

For these reasons, it is appropriate for this Court to declare whether states may reasonably restrict nonresidents' access to their courts without running afoul of the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution and, if so, what the permissible parameters of such restrictions may be. Indeed, it appears that this Court has not addressed the right of access to courts *vis à vis* the Privileges and Immunities Clause in half a century. The absence of a contemporary, clearly articulated standard on this issue will only bring about confusion and inconsistency among the states as they attempt to adjust to the modern tort landscape.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

January 2006 Term

FILED
June 29, 2006
released at 3:00 p.m.
RORY L. PERRY II,
CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

No. 32751

JEREMIAH "BART" MORRIS,
Plaintiff Below, Appellant
v.

CROWN EQUIPMENT CORPORATION,
a foreign corporation; and JEFFERDS CORPORATION,
dba HOMESTEAD MATERIALS HANDLING
COMPANY,
a West Virginia Corporation,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Hon. Tod J. Kaufman, Judge
Case No. 04-C-1174

REVERSED AND REMANDED

Submitted: March 29, 2006
Filed: June 29, 2006

John W. Cooper, Esq.
Cooper, Preston & Douglas
Parsons, West Virginia
Thomas W. Pettit, Esq.
Barboursville,
West Virginia
Attorneys for Appellant

Michael J. Farrell, Esq.
Robert L. Hogan, Esq.
Farrell, Farrell & Farrell
Huntington, West Virginia
Attorneys for Crown
Equipment Corp.

Thomas J. Cullen, J.R., Esq.
Adam T. Sampson, Esq.
Godell, DeVries, Leech & Dawn
Baltimore, Maryland
Pro Hac Vice for Crown Equipment Corp.

Lawrence E. Morhous, Esq.
M. Hudson McClanahan, Esq.
Brewster, Morhous, Cameron, Mullin, Caruth & Moore
Bluefield, West Virginia
Attorneys for Jefferds Corporation, dba Homestead Materials Handling Co.

JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. Under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

3. *W.Va. Code*, 56-1-1(c) [2003] does not require a plaintiff to separately establish venue for each defendant.

Starcher, J.:

In this case we hold that a plaintiff cannot be denied the right to bring a products liability lawsuit in this state against a West Virginia corporation and an out-of-state corporation merely because the plaintiff is a resident of another state.

I.
Facts & Background

The complaint in the instant case alleged the following facts: the appellant and plaintiff below, Jeremiah "Bart" Morris ("Morris"), a resident and citizen of Virginia, suffered a severe leg injury at his place of employment in Virginia while operating a stand-up forklift that was distributed and serviced by the appellee and defendant below, Jefferds Corporation, dba Homestead Materials Handling Company ("Jefferds"), a West Virginia corporation. The forklift was designed, manufactured, and distributed by the appellee and defendant below, Crown Equipment Corporation ("Crown"), an Ohio corporation.[1]

On April 30, 2004, Morris filed a civil action against Jefferds and Crown in the Circuit Court of Kanawha County, West Virginia, alleging various products liability theories of recovery, including negligence, strict liability, failure to warn, and breach of warranty, as well as asserting a claim for punitive damages.

---

[1] The complaint further alleged that Jefferds was incorporated under the laws of West Virginia, had its principal place of business in Kanawha County, West Virginia, conducted business in Kanawha County, West Virginia, and was engaged in the business of servicing, maintaining, providing warnings, providing training, testing, inspecting, marketing, distributing, and selling materials handling equipment, including Crown stand-up forklifts. The complaint further alleged that Jefferds provided, serviced, maintained, tested, inspected, marketed, provided with warnings, provided training for, and distributed to Morris' employer the Crown stand-up forklift upon which Morris was injured.

Jefferds and Crown filed motions to dismiss the complaint for improper venue based upon *W. Va. Code*, 56-1-1 [2003], which states:

> (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> (1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is;
>
> (2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management;
>
> (3) If it be to recover land or subject it to a debt, where the land or any part may be;
>
> (4) If it be against one or more nonresidents of the state, where any one of them may be

found and served with process or may have estate or debts due him or them;

(5) If it be to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

(6) If it be on behalf of the state in the name of the attorney general or otherwise, where the seat of government is; or

(7) If a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his or her court, the action or suit may be brought in any county in an adjoining circuit.

(b) Whenever a civil action or proceeding is brought in the county where the cause of action arose under the provisions of subsection (a) of this section, if no defendant resides in the county, a defendant to the action or proceeding may move the court before which the action is pending for a change of venue to a county where one or more of the defendants resides and upon a showing by the moving defendant that the county to which the proposed change of venue would be made would better afford convenience to the parties litigant and the witnesses likely to be called, and if the ends of justice would be better served by the change of venue, the court may grant the motion.

(c) *Effective for actions filed after the effective date of this section, a nonresident of*

> *the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided, That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant.*
>
> *In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. A person may not intervene or join in a pending civil action as a plaintiff unless the person independently establishes proper venue. If venue is not proper as to any such nonresident plaintiff in any court of this state, the court shall dismiss the claims of the plaintiff without prejudice to refiling in a court in any other state or jurisdiction.*

(Emphasis added.)

Jefferds and Crown argued in their motions to dismiss that Morris is a nonresident[2] of West Virginia, and

---

[2] This opinion will primarily use the term "nonresident" to mean a nonresident or noncitizen of West Virginia; and similarly, the term" resident" will mean resident *or* citizen. It is now established that under

that no substantial part of Morris' cause of action arose in West Virginia. Therefore, Jefferds and Crown argued, the provisions of *W. Va. Code*, 56-1-1(c)[2003] required dismissal of Morris' case on improper venue grounds, unless Morris demonstrated by affidavit that he could not bring his case in some other jurisdiction.

Morris argued in reply that the application of *W Va. Code*, 56-1-1(c) [2003] to Morris as a nonresident in the fashion suggested by Jefferds and Crown was unconstitutional under the Privileges and Immunities Clause

---

the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's "residence" and discrimination based on a person's "citizenship."

> . . . [D]espite some initial uncertainty . . . it is now established that the terms "citizen" and "resident" are "essentially interchangeable," *Austin v. New Hampshire*, 420 U.S. 656, 662, n. 8[, 95 S.Ct. 1191, 1195 n. 8, 43 L.Ed.2d 530 n. 8] (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause.

United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden, 465 U.S. 208, 216, 104 S. Ct. 1020, 1026 - 1027, 79 L.Ed. 2d 249, ___ (1984).

> Similarly, while the Court unquestionably has come to treat the terms "citizen" and "resident" in this area as "essentially interchangeable," *Austin v. New Hampshire*, 420 U.S., at 662, n. 8, it has done so not out of a general disregard for the Constitution's language, but rather because the practical relationship between residence and citizenship is close enough that discrimination on the basis of the one criterion effectively amounts to discrimination based on the other.

Id. at 234, 104 S.Ct. at 1036, 79 L. Ed. 2d at 249 (1984). Thus, when weighing the persuasiveness and relevance of decisions in cases that statedly rest their reasoning on the premise that discrimination against individuals on the basis of citizenship is constitutionally suspect – while discrimination on the basis of residence is constitutionally inoffensive – the current irrelevance of that distinction in most cases must be taken into account.

of the United States *Constitution,* Art. IV, Sec. 2, which states in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[3]

Morris argued that the interpretation and application of *W. Va. Code*, 56-1-1(c) [2003] asserted by Jefferds and Crown was constitutionally impermissible because such an interpretation and application would impose a categorical bar upon nonresidents of West Virginia in their access to the West Virginia courts in cases where an otherwise similarly situated resident of West Virginia would not experience such a bar.

Morris further argued that Jefferds' status as a West Virginia corporation established proper venue as to Jefferds, and that because Jefferds served as a venue-giving defendant, Morris could properly join Crown as well.

Finally, Morris argued that the statutory prerequisite for the application of *W. Va. Code*, 56-1-1(c) [2003] – that "all or a substantial part of the acts or omissions giving rise to the claim asserted [did not occur in West Virginia]" – was not established. Morris argued that his Complaint and two subsequent Amended Complaints in fact did set forth allegations establishing that a "substantial part" of the acts or omissions giving rise to his claims did occur in West Virginia.[4]

---

[3] Morris also raised the Open Courts Clause of the *West Virginia Constitution*, Art. III, Sec. 17, which states that:

> The courts of this State shall be open, and *every person*, for an injury done to him, in his person, property, or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

(Emphasis added).

In light of our disposition of the instant case, we do not address this constitutional provision.

[4] The Federal venue statute, 28 U.S.C. Sec. 1391, provides that venue lies in any district "in which *a substantial part* of the events or omissions

giving rise to the claim occurred . . . " (Emphasis added). "[T]his rule ... is open to the possibility that a claim may have arisen in more than one district . . .," Hodson *v. A. H. Robins Co.*, 528 F. Supp. 809, 814 (E.D. Va. 1981). "[T]he plaintiff is not required to establish that his chosen venue 'has the most substantial contacts to the dispute; rather, it is sufficient that *a* substantial part of the events occurred [here], even if a greater part of the events occurred elsewhere.'" *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, 350 F. Supp. 2d 561, 568 (D. Vt. 2004) (emphasis added, *citing Kirkpatrick v. Rays Group*, 71 F. Supp. 2d 204, 212 (S.D.N.Y. 1996)). The Supreme Court of Pennsylvania has stated that determining whether conduct is a substantial factor ". . . simply involves the making of a judgment as to whether defendant's conduct . . . is so insignificant that no ordinary mind would think of it as a cause for which a defendant should be held responsible." *Ford v. Jeffries*, 379 A. 2d 111, 114 (Pa. 1977) (citing the *Restatement (Second) of Torts* sec. 431, comments a. and b.).

For reasons that do not appear in the record, the circuit court did not grant Morris' timely motions for leave to amend his complaint, and denied Morris' requests for leave to conduct limited discovery to establish further facts that would show that venue was proper in West Virginia. A party may amend a pleading by leave of court, and such leave shall be freely given when justice requires. *W.Va.R.Civ.P.* 15(a); *Brooks v. Isinghood*, 213 W.Va. 675, 684, 584 S. E. 2d 531 (2003).

The circuit court did indicate that it had "considered" the allegations in Morris' amended complaints in ruling on the Jefferds and Crown motions to dismiss.

> Morris's Second Amended Complaint stated, in part:
>
> i. Jefferds inadequately serviced and maintained, failed to provide adequate warnings, failed to provide adequate training, provided warranties, failed to adequately test, failed to adequately inspect, failed to adequately analyze the dangers of, failed to adequately disclose the dangers of, failed to guard against the dangers of, marketed, distributed, installed, and/or sold the forklift at issue at or from its offices in West Virginia;
>
> ii. Jefferds made (or failed to make) management level analyses and decisions from its West Virginia corporate headquarters related to service and maintenance schedules and items; training of service and maintenance personnel; product safety and the dangers associated with the use of the product; operator safety; warnings to be provided and the sufficiency thereof; operator training and instruction

and the sufficiency thereof; warranties to be provided; testing, inspection; necessary guarding; product lines to be carried; marketing; distribution; sale; installation; associated contractual arrangements or other agreements; and other items related to stand-up forklifts in general, and the forklift which caused the plaintiffs injury in particular;

iii. Jefferds made the contractual arrangements or other agreements related to the provision and installation of the subject forklift to the Alcoa facility, through its office in West Virginia.

iv. The instructions, manuals, warnings, service records, installation records, warranties, and other information about the forklift were provided by Jefferds out of its West Virginia offices;

v. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were provided from its office in West Virginia;

vi. The employees of Jefferds who serviced the forklift both prior to and after installation at the Alcoa facility were trained at its office in West Virginia;

vii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the design of Crown's stand-up forklifts and the associated dangers;

viii. Jefferds failed, at its office in West Virginia, to properly evaluate and investigate the accident history of Crown stand-up forklifts, and to warn its customers and end users thereof;

ix. Jefferds failed, at its office in West Virginia, to adequately analyze the hazards to the operators of the forklifts and guard against the same;

x. Jefferds failed, from its offices in West Virginia, to provide adequate operator training and instruction;

xi. Jefferds marketed, distributed, sold, or otherwise installed the forklift from its offices in West Virginia;

x. Jefferds engaged in other, as yet unidentified, substantial acts or omissions related to the claims being asserted.

Although it is not necessary to decide this issue in light of our resolution of the instant case, it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a "substantial" portion

The circuit court accepted Jefferds' and Crown's arguments based on Morris' nonresidency and *W.Va. Code*, 56-1-1(c) [2003]. By orders dated September 1, 2004, and November 24, 2004, the circuit court granted the appellees' motions to dismiss. The circuit court also issued an "Order Denying Plaintiff's Motion to Reconsider" on November 29, 2004. Morris appeals from these orders.

II.
Standard of Review

A trial court's ruling on a motion to dismiss is reviewed under a *de novo* standard. *Kopelman and Associates v. Collins,* 196 W.Va. 489, 492, 473 S. E. 2d 910, 913 (1996). Constitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review. *West Virginia ex rel. Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 261-262, 580 S. E. 2d 869, 875-876 [2003]. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

III.
Discussion

We begin our discussion by examining the Privileges and Immunities Clause, Art. IV, Sec. 2, of the *United States Constitution*. We then look to what courts have said about access to the courts and the Clause.

---

of the acts or omissions giving rise to Morris' claims occurred in West Virginia.

A.

Privileges and Immunities

In *Austin v. New Hampshire*, 420 U.S. 656, 662, 95 S.Ct. 1191, 1195, 43 L.Ed. 2d 530, 535-536 (1975), the Court stated:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism.

(Footnote omitted.)

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 380-382, 98 S.Ct. 1852, 1858-1859, 56 L.Ed. 2d 354, 363-364 (1978), the Court quoted from *Paul v. Virginia*, 8 Wall. 168, 180 (1869):

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the

> Constitution has tended so strongly to constitute the citizens of the United States one people as this.

and from *Hague v. CIO*, 307 U.S. 496, 511, 59 S.Ct. 954, 962, 83 L. Ed. 1423, 1434 (1939) (Roberts, J. concurring):

> . . . Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

(Footnotes omitted.)

B.

Access to the Courts

On the subject of access to the courts in the context of the Privileges and Immunities Clause, Am. Jur. 2d, *Constitutional Law*, Sec. 769 (2006) says:

> Among the privileges and immunities of citizenship is included the right of access to courts for the purpose of bringing and maintaining actions. This privilege includes the right to employ the usual remedies for the enforcement of personal rights in actions of every kind. *While a state may decide whether and to what extent its courts will entertain particular causes, any policy the state may choose to*

> *adopt must operate in the same way upon citizens of other states as upon its own, and the privileges it affords to the latter class it must afford to the same extent to the other, but not to any greater extent.*

(Footnotes omitted, emphasis added.)

In *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L. Ed. 1227, 1229 (1934), the Court stated:

> The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution. The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens.

(Citation omitted.)

In *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142,148-149,28 S.Ct. 34, 35, 52 L.Ed.143, 146 (1907), the Court stated:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is

> granted and protected by the Federal Constitution.

(Citations omitted.)

* * *

> The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. . . . But any policy the state may choose to adopt must operate in the same way on its own citizens and those of other states. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land.

In Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 562, 40 S.Ct. 402, 404, 64 L.Ed. 713, 716 (1920), the Court stated:

> . . . [t]he constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free

> access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.[5]
>
> Finally, a leading commentator has said:
>
> The familiar rhetorical statements of the unqualified duty of a state to open its courts to citizens of other states are no longer to be taken literally . . . These statements do, however, express the truth that *the privileges-and-immunities clause requires a state to open the doors of its courts to citizens of other states who assert claims against local residents and citizens, even on causes of action predicated upon the law of another state, if it would allow its own citizens to assert such a cause of action.* . . . [I]t is the duty of the governments to make their citizens and persons residing within their borders respond to their civil obligations; any other rule would be intolerable.

(Emphasis added.) Carrie and Schechter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).[6]

---

[5] *See also Missouri Pacific Railroad Co. v. Clarendon Boar Oar Co.*, 257 U.S. 533, 535, 42 S.Ct. 210, 211, 66 L. Ed. 354, 356 (1922) ("[The Privileges and Immunities Clause] secures citizens of one State the right to resort to courts of another, equally with citizens of the latter State[.]"); *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698, 704, 62 S.Ct. 827, 830, 86 L. Ed. 1129, 1134, (1942); *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 78, 40 S.Ct. 228, 64 L.Ed. 460, 469 (1920).

[6] *See also Gober v. Federal Life Ins. Co.*, 255 Mich. 20, 24, 237 N.W. 32, 33 (1931) (applying the Privileges and Immunities Clause) ("If defendant

From the foregoing authorities, it may be concluded that there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit.

The appellee Jefferds argues that despite the foregoing authority, *W. Va. Code*, 56-1-1(c) [2003] should be read to set forth a constitutionally valid rule that categorically bars nonresidents from bringing certain lawsuits – even lawsuits against West Virginia residents – when the same lawsuit could be brought by a West Virginia resident.

That is, under Jefferds' proposed reading and application of *W. Va. Code*, 56-1-1(c) [2003], if Mr. Morris and a West Virginia resident had both been injured in the accident in question, the West Virginia resident would encounter no obstacle to filing suit against Jefferds in West Virginia. Only Morris would be so barred, by reason of his residency in Virginia. However, the foregoing-quoted authorities are agreed in stating that Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents.

Jefferds argues that this Court is restricted by our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) from narrowing or constraining a broad, literal application of *W.Va. Code*, 56-1-1(c) [2003] that would categorically bar suits by nonresidents in West Virginia courts in instances when the same suit could be brought by a West Virginian – even cases against West Virginia defendants.

Our decision in *Riffle* simply deferred to Legislatively-prescribed principles governing intra-state venue. However, in *Riffle* this Court explicitly disavowed

---

were a domestic corporation, there would be no doubt of plaintiff's right to sue in this State on her cause of action.").

applying its decision to interstate situations. 195 W.Va. at 128, n.11, 464 S.E.2d 763, at 770, n.11. This Court also noted in *Riffle* that none of the parties had raised constitutional challenges to the statutory language at issue in that case. *Id.*, 195 W.Va. at 126 n.6, 464 S. E. 2d at 768 n.6. Accordingly, *Riffle* does not and could not authorize this Court to disregard the Privileges and Immunities Clause of the *United States Constitution,* when that issue is properly brought, as it affects a provision of our venue statutes in an interstate context.

A reading or application *of W.Va. Code*, 56-1-1(c) [2003] that would categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a nonresident would contravene the constitutionally permissible scope of the venue statutes in an interstate context. There is no evidence in the cases cited by the parties or identified in this Court's research showing any trend in favor of such distinctions. Additionally, erecting such barriers would contravene established West Virginia law, including other provisions of *W.Va. Code*, 56-1-1 [2003].[7]

---

[7] *W.Va. Code*, 56-1-1(a)(1)[2003] states that venue lies against a domestic corporation doing business in this State wherein its principal office is located, or where its president or principal officer resides. We recognized in *Wetzel County Savings and Loan v. Stern Bros, Inc.*, 156 W.Va., 693, 699, 195 S.E. 2d 732, 737 (1973), that the principal place of business of the defendant corporation was an appropriate venue for a lawsuit. In the Syllabus of *State ex rel. Huffman v. Stephens*, 206 W.Va. 501, 526 S.E.2d 23 (1999), we stated:

> Whether a corporation is subject to venue in a given county in this State under the phrase in W. Va.Code, 56-1-1(b), "wherein it does business" depends upon the sufficiency of the corporation's minimum contacts in such county that demonstrate it is doing business . . ..

See Syllabus, *Brent v. Board of Trustees of Davis and Elkins College*, 163 W.Va. 390, 256 S.E.2d 432 (1979):

> If a corporation has made a contract to be performed in whole or in part by any party thereto in a county, has committed a tort in whole or in part in that

It is axiomatic that

> . . . wherever an act of the legislature can be so *construed and applied* as to avoid a conflict with the constitution, and give it the force of law, such construction will be adopted by the court.

(Emphasis added.)

Peel Splint Coal Co. v. State, 15 S.E. 1000, 1004 (1892). A narrow-breadth reading of a statute to assure that its application is constitutionally proper is appropriate as a less-intrusive remedy, *cf. Weaver v. Shaffer*, 170 W.Va. 107, 111, 290 S.E.2d 244, 248 (1980).

We therefore hold that under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.

Applying the foregoing principles to the facts of the instant case, we conclude that the circuit court impermissibly applied *W.Va. Code*, 56-1-1(c) [2003] to treat Mr. Morris' nonresidency as a categorical bar to his

---

> county, or has manufactured, sold, offered for sale or supplied any product in a defective condition and such product has caused injury to any person or property within that county, it is doing business there and the county's courts have venue to try suits against it which arise from or grow out of such contract, tort or manufacture, sale, offer for sale or supply of such defective product.

See also McGuire v. Fitzsimmons, 197 W.Va. 132, 136, 475 S.E. 2d 132,136 (1996):

> The plain language of W. Va.Code, 56-1-1(a)(1) [1986] does not limit the venue to one county but provides at least two possible justifications for proper venue: either the residence of the defendants or where the "cause of action arose."

bringing a suit in West Virginia against Jefferds. Moreover, Jefferds is a West Virginia corporation, and the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to Morris' suit against Jefferds.

Therefore, the circuit court's dismissal of Morris' suit against Jefferds must be reversed.

C.

Venue-Giving Defendant

We turn our discussion to the circuit court's dismissal of Morris' case against Crown, the manufacturer of the product that Morris says caused his injury. Crown is not a West Virginia corporation, but it is the manufacturer of a product that was sold and distributed by a West Virginia corporation.

It must first be recognized that Morris' suit against Crown is essentially a products liability case. Products liability suits typically allege that a manufacturer designed and/or produced a product and put the product into the stream of commerce, and that the product was unsafe or flawed in such a way so as to give rise to the liability of the manufacturer for injuries resulting from the use of the product. The alleged unsafeness or flaw(s) may be as a result of the actual design or construction of the product, or in the adequacy of warnings provided to the user(s) of the product. *See generally Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) and its progeny.

Products liability cases are a feature of every state's law, and manufacturers who put their products into the stream of interstate commerce expect that they may be called to account in court for the safety of the design and manufacture of their products in other states – even though no "culpable" conduct by the manufacturer relating to the design or manufacture of the product occurred in the jurisdiction in which the claim against the manufacturer is

brought. This fundamental principle of products liability law underlies our analysis.

A second fundamental principle that must be recognized is that:

> This Court follows the venue-giving defendant principle, whereby, once venue is proper for one defendant, it is proper for all other defendants subject to process.

Syllabus Point 1, *Staats v. Co-Operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943); *McConaughey v. Bennett's Executors*, 50 W.Va. 172, 179, 40 S.E. 540, 541 (1901). *See also State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 231, 366 S.E.2d 738, 739-40 (1988); *McGuire v. Fitzsimmons*, 197 W.Va. 132, 137, 475 S.E.2d 132, 137 (1996); *Union Carbide & Carbon Corp. v. Linville*, 142 W.Va. 160, 164-165, 95 S.E. 2d 54, 57 (1956); *Webber v. Offhaus*, 135 W.Va. 138, 146-147, 62 S.E. 2d 690, 696 (1950); *McConaughey & Co. v. Bennett*, 50 W.Va. 172, 179, 40 S.E. 540, 542-543 (1901). The principle of the venue-giving defendant has been an established feature of our law for more than one hundred years, and it is closely intertwined with our procedural rules on joinder.[8]

Complementing and reflecting the longstanding venue-giving defendant principle in our case law and our

---

[8] The mandatory joinder rule of *W.Va.R.Civ.P.*, Rule 19(a) requires a plaintiff to join in one action all persons who are subject to service of process and in whose absence complete relief cannot be accorded among those already parties. Similarly, the permissive joinder rule of *W.Va.R.Civ.P.*, Rule 20, permits a plaintiff to join as defendants all persons whose liability arises "out of the same transaction, occurrence, or series of occurrences and if any question of law or fact common to all defendants will arise in the action." The goal of both mandatory and permissive joinder is the promotion of judicial economy by preventing both the duplication of effort and the uncertainty embodied in piecemeal litigation.

procedural rules, the provisions of *W.Va. Code*, 56-1-1 [2003] state that venue for "*any* civil action" or "*the* cause of action" is appropriate "wherein *any* of the defendants may reside . . ." and "where *one or more* of the defendants resides." *W Va. Code*, 56-1-1(a) and (b) [2003] (emphasis added).

Crown argues that despite the fact that products liability cases are commonly brought against manufacturers in jurisdictions other than where the product was designed or built, and despite West Virginia's settled venue-giving defendant principle, because Morris is a nonresident of West Virginia, Morris must show *separate acts by Crown that occurred in West Virginia* (*i.e.*, Morris must separately "establish venue" for Crown) before Morris can join Crown as a defendant along with Jefferds in Morris' suit in West Virginia.

In support of this argument, Crown points to language in *W. Va. Code*, 56-1-1(c)[2003] which would bar suit by a nonresident in West Virginia ". . . unless all or a substantial part of the acts or omissions giving rise to *the claim* asserted occurred in this state." Crown notes that *W.Va. Code*, 56-1-1(a) and (b) [2003] use the terms "cause of action" or "civil action" when saying that a case may be brought wherever one of the defendants is located, see discussion *supra* – while *W. Va. Code*, 56-1-1(c)[2003] uses the term "claim." Crown argues that Morris therefore must separately establish venue for his "claim" against Crown, by showing culpable "acts or omissions" by Crown that occurred in West Virginia.

A rule in accord with Crown's argument would run counter to established principles of joinder and judicial economy. Modern economies operate in complex, multi-jurisdictional networks of designers, manufacturers, distributors, retailers, purchasers, and users. When reasonably possible, legal claims involving these sorts of parties that arise from particular incidents and injuries involving a product should be resolved in a unitary forum.

As this Court recently stated in *Charleston Area Medical Center, Inc. v. Parke-Davis*, 217 W. Va. 15, 21, 614 S.E.2d 15, 21 (2005), quoting *Board of Ed. v. Zando, et. al.*, 182 W.Va. 597, 603-604, 390 S.E. 2d 796, 802-803:

> [t]he fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice--to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts.

In the instant case, where a substantial part of the culpable acts or omissions of one joint tortfeasor (Jefferds) are alleged to have occurred in West Virginia, and where the culpable acts or omissions of a second joint tortfeasor (Crown) are alleged to have occurred outside West Virginia, a requirement that the plaintiff independently "establish venue" with respect to the out-of-state tortfeasor would effectively prevent joinder of the out-of-state tortfeasor. This would be an absurd result, contrary to all established procedure.

Additionally, Crown's assertion that the statute's use of the word "claim" supports Crown's argument is not well-founded. *Black's Law Dictionary, Centennial Edition*, 6th Ed. 1990, defines the term "claim," *inter alia*, as "[a] cause of action." In *Barker v. Traders Bank*, 152 W.Va. 774, 780, 166 S.E.2d 331, 335 (1969), this Court stated that "Rule 8(a), R.C.P., contemplates a succinct *complaint* containing a plain statement of *the* nature of *the claim* together with a demand for judgment." (Emphasis added). *Cf. Sticklen v. Kittle*, 168 W.Va. 147, 162, 287 S.E.2d 148, 156 (1981) (equating "claim" and "complaint")

There is certainly a sufficient overlap and identity

between the ordinary meaning of the terms "claim," "civil action," and "cause of action," as they are used in *W. Va. Code*, 56-1-1 [2003] so as to weigh against finding that the use of the word "claim" in *W. Va. Code*, 56-1-1(c)[2003] establishes a novel rule that would fragment cases, foster piecemeal litigation, and radically alter settled procedures.

Additionally, Crown's suggestion that such a rule should be applied only to nonresidents runs headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts. Application of these principles further weighs against such a reading of the statutory language.

For these reasons, this Court will not derive such an intent from the statute's use of the word "claim," nor enforce such a rule. Following our settled law, we hold that *W. Va. Code*, 56-1-1(c) [2003] does not require a nonresident plaintiff to separately establish venue for each defendant.

Based on this holding, the circuit court's dismissal of Crown as a defendant must be reversed.

IV.
Conclusion

The circuit court's dismissal of the plaintiff's claims against the appellants is reversed and this case is remanded.

Reversed and Remanded.

Maynard, Justice, dissenting:

FILED
June 30, 2006
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

I would have affirmed the circuit court's dismissal of the appellant's lawsuit because I do not believe that a construction of W.Va. Code § 56-1-1(c) that prevents the appellant from bringing his action in Kanawha County violates the Privileges and Immunities Clause.

In *Douglas v. New Haven R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), the Supreme Court considered the constitutionality of a New York statute that provided:

> An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; . . . . 4. Where a foreign corporation is doing business within this State.

279 U.S. at 386, 49 S.Ct. 355. The plaintiff's injuries in *Douglas* were inflicted in Connecticut where the plaintiff was a citizen and resident, and the defendant was a Connecticut corporation which did business in New York. The plaintiff brought her suit in New York, and the trial court dismissed it under the above statute. The New York appellate courts upheld the dismissal.

On appeal to the Supreme Court, the plaintiff argued that the statute as construed by the trial court "makes a discrimination between citizens of New York and citizens of other States, because it authorizes the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York." 279 U.S. at 386,

49 S.Ct. at 356. The Supreme Court rejected this argument and affirmed the dismissal. The Court explained:

> It is said that a citizen of New York is a resident of New York wherever he may be living in fact, and thus that all citizens of New York can bring these actions, whereas citizens of other States can not unless they are actually living in the State. But however often the word resident may have been used as equivalent to citizen, and for whatever purposes residence may have been assumed to follow citizenship, there is nothing to prohibit the legislature from using "resident" in the strict primary sense of one actually living in the place for the time, irrespective even of domicile. If that word in this statute must be so construed in order to uphold the act or even to avoid serious doubts of its constitutionality we presume that the Courts of New York would construe it in that way; as indeed the Supreme Court has done already in so many words.
>
> * * * *
>
> Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between nonresidents with regard to these foreign causes of action. . . . There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

279 U.S. at 386-387, 49 S.Ct. at 356 (citations omitted); *see also State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4, 71 S.Ct. 1, 2-3, 95 L.Ed. 3 (1950) (indicating that "if a State chooses to prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control").

Douglas was relied upon by the Oklahoma Supreme Court in the case of *St. Louis-San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773 (1954). In that case, the Court was presented with the issue "whether a . . . court of this state can, because of inconvenience to court and parties, dismiss an action brought by a non-resident plaintiff against a foreign corporation on a cause of action arising outside this state." 276 P.2d at 775. In answering this question in the affirmative, the Court, citing *Douglas*, explained:

> [A] state may not, by reason of the privileges and immunities clauses of the federal Constitution, allow suits in its courts by its own non-resident citizens for liability arising out of conduct outside that state and discriminatorily deny access to its courts to a non-resident who is a citizen of another state. But if a state chooses to prefer residents in access to often over-crowded courts to deny such access to all non-residents, whether its own citizens or those of other states, it is a choice within its own control.

276 P.2d at 777.[1]

---

[1] The majority indicates in footnote 2 of its opinion that there is no distinction for purposes of the Privileges and Immunities Clause between discrimination on the basis of residency and discrimination on the basis of citizenship. It should be noted that my construction of the statute at issue makes no such distinction. Rather, it treats all

I would construe W.Va. Code § 56-1-1(c) to apply to all nonresidents, both citizens and noncitizens of West Virginia. In other words, this statute would also prevent a West Virginia citizen who is residing in Ohio for the purpose of employment and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia. Such a construction, according to the law set forth above, would not offend the Privileges and Immunities Clause.

W.Va. Code 56-1-1(c) serves an important purpose. Specifically, it is designed to give the residents of this State, who after all pay for our courts, ready access to them when needed. This can be effectively achieved only by preventing nonresidents from abusing our courts by flooding them with litigation, not because they do not have a forum elsewhere, but simply because they believe they may achieve a better result here. For example, in the case of *Grimmett v. CSX Transportation, Inc.*, which was recently referred to the Mass Litigation Panel, approximately 71 out of 79 plaintiffs are nonresidents of West Virginia. In fact, these plaintiffs were involved in actions that were originally filed in Gwinnett County, Georgia. These nonresident plaintiffs who may have very legitimate claims are nevertheless expending the time and limited resources of our State court system, to the detriment of resident plaintiffs, when their claims could have been brought elsewhere. Unfortunately, the majority opinion eviscerates a statutory safeguard against this type of abuse.

---

nonresidents, both citizens and noncitizens, the same for the purpose of applying W.Va. Code § 56-1-1(c).

Accordingly, for the reasons stated above, I dissent.[2]

---

[2] South Carolina has a similar provision in its venue statute concerning foreign corporations as defendants. According to S.C. Code Ann. § 15-5-150 (1976),

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court; . . . (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

Benjamin, Justice,
concurring in result only:

FILED
July 11, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

I agree with the majority's decision to reverse the trial court's dismissal of this matter and remand the case for further proceedings. I do so, however, not upon the constitutional analysis invoked by the majority, but upon far simpler grounds. In my opinion, the plain terms of W. Va. Code § 56-1-1(c) (2003), require reversal of the trial court's dismissal of this action and a remand to resolve the factual question of whether "all or a substantial part of the acts or omissions giving rise to the claim occurred in this state" based upon the allegations contained in the amended complaint and upon Jefferds Corporation's ["Jefferd"'s] status as a West Virginia corporation.[1] If a factual basis is confirmed for Morris' allegations regarding Jefferds' West Virginia operations and acts related to his claim, venue is proper in West Virginia pursuant to W. Va. Code § 56-1-1(c) (2003). Thus, resolution of this matter does not now necessitate addressing the constitutionality of West Virginia's venue statute.

This Court has repeatedly stated that it will avoid invalidating a statute on constitutional grounds where reasonably possible. In 1965, this Court held that:

---

[1] As referenced in n. 4, *supra*, of the majority's opinion, it is not readily apparent from the record why Morris' motion to amend his pleadings was denied. Rule 15(a) of Rules of Civil Procedure provides that leave to amend shall be freely given when justice requires. However, trial courts should also insure that parties not abuse our Rules with fraudulent or deliberately exaggerated pleadings. In such cases, it is expected that trial courts will use the full panoply of sanctions available, beginning with Rule 11 of the West Virginia Rules of Civil Procedure.

> [i]n considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *State ex rel Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965); *see also*, Syl. Pt. 2, *State ex rel Riley v. Rudloff*, 212 W. Va. 767, 575 S.E.2d 377 (2002) (quoting *Gainer)*. Indeed, "[t]he well settled general rule is that in cases of doubt the intent of the Legislature not to exceed its constitutional powers is to be presumed and the courts are required to favor the construction which would consider a statute to be a general law." Syl. Pt. 8, *State ex rel Heck's Inc. v. Gates*, 149 W. Va. 421, 141 S.E.2d 369 (1965). More recently, this Court summarized its duty in addressing the constitutionality of statutes by stating:

> Only when it can be said beyond a reasonable doubt that a law violates the Constitution of this State will we invalidate a legislative enactment on constitutional grounds. Thus, [w]hen the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in

> order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment. In this regard, [c]ourts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.

Carvey v. State Bd. of Educ., 206 W. Va. 720, 727, 527 S.E.2d 831, 838 (1999) (internal quotations and citations omitted). This mandated exercise of judicial restraint in addressing a challenge to the constitutionality of legislation should have, in my opinion, resulted in the majority resolving this matter through application of plain statutory language. Morris' appeal of the dismissal of his lawsuit may properly be resolved by applying the plain language of W. Va. Code § 56-1-1, without addressing the constitutionality of W. Va. Code § 56-1-1(c).

Morris brought his product liability suit against Crown Equipment, an Ohio corporation and the manufacturer of the forklift at issue, and Jefferds, a *West Virginia* corporation and the forklift's distributor/seller and maintenance service provider. Pursuant to our venue statute, a civil action may be brought against a West Virginia corporation in any county where its principle office is located or where its president or chief officer resides. W. Va. Code § 56-1-1 (a)(2).[2] Morris alleged in his complaint that Jefferds'

---

[2] W.Va. Code § 56-1-1(a)(2) provides:

principle office was located in Kanawha County, the county in which he filed his lawsuit. Jefferds denies in its brief before this Court that its principle office is located in Kanawha County. However, in its order of November 24, 2004, the circuit court found that Jefferds' "officers" live in Kanawha County. Without resolving the conflict regarding the location of Jefferds' principle office in Kanawha County, the trial court's finding regarding Jefferds' officers' residence demonstrates venue was properly established in Kanawha County, as to Jefferds, pursuant to W. Va. Code § 56-1-1 (a) (2).

> Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:
>
> . . .
>
> If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business; or if it be a corporation organized under the laws of this state which has its principal office located outside of this state and which has no office or place of business within the state, the circuit court of the county in which the plaintiff resides or the circuit court of the county in which the seat of state government is located shall have jurisdiction of all actions at law or suits in equity against the corporation, where the cause of action arose in this state or grew out of the rights of stockholders with respect to corporate management[.]

Under this statutory provision, venue is proper in any county where a corporate defendant's principle place of business is located. Where a West Virginia corporation has its principle place of business in another state, our venue statute then imposes a secondary requirement that the cause of action arose in this state for the establishment of proper venue. As Jefferds is a West Virginia corporation with its principle place of business in West Virginia, Morris was not, under this statutory provision, also required to demonstrate that his cause of action against Jefferds arose in West Virginia.

The circuit court, however, dismissed Morris's suit due to the 2003 enactment of W. Va. Code § 56-1-1(c), which provides, in relevant part, that "a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state[.]" Finding Morris was a resident of Virginia and the forklift accident at issue occurred in Virginia, the circuit court found that Kanawha County, West Virginia, was an improper venue for Morris' claims against Jefferds. The circuit court's order reflected that it considered the allegations against Jefferds contained in Morris' proposed amended complaint, although the circuit court did not permit the amendment of Morris' complaint.

In the proposed amended complaint, Morris set forth numerous allegations of conduct occurring in West Virginia giving rise to his claims against Jefferds.[3] If true, these allegations may indeed satisfy W. Va. Code § 56-1-1(c)'s requirement that "all or a substantial part" of the acts underlying Morris' claims against Jefferds occurred in West Virginia. In my opinion, the circuit court prematurely dismissed Morris' claims. Morris should have been given the opportunity to conduct limited discovery on the venue issue. If discovery revealed that "all or a substantial part" of Jefferds' acts or omissions occurred in West Virginia, as alleged, venue is proper in Kanawha County, Therefore, I would reverse and remand this matter for the purpose of conducting limited discovery to resolve the crucial factual dispute as to whether the requirements of W. Va. Code § 56-1-1(c) are met in this matter. Fundamental fairness requires more than a resident defendant's mere denial of a non-resident's allegation of proper venue and the factual allegations supporting such venue before access to our courts is denied under W. Va. Code § 56-1-1(c). If Morris were

---

[3] *See, supra,* n.4, majority opinion.

able, upon remand, to properly establish venue as to Jefferds, a West Virginia corporation, in Kanawha County, he likewise establishes proper venue for his entire lawsuit.[4] The majority, however, has relieved Morris of this obligation by simply invalidating W. Va. Code § 56-1-1(c).

As noted above, I do not believe that the proper resolution of this appeal requires this Court to address the constitutionality of W. Va. Code § 56-1-1(c). However, because the majority hinges its opinion in this case on the constitutionality of this non-resident venue statute, some observations regarding this statute are appropriate in light of Article IV, Section 2 of the Constitution of the United States, the Privileges and Immunities Clause.[5]

Contrary to the majority's suggestion, the Privileges and Immunities Clause does not categorically bar distinctions based upon residency for venue purposes. In *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), Justice Frankfurter recognized that under:

> the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, s 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability under the

---

[4] As noted by the majority, West Virginia follows the venue-giving defendant principle which provides that once venue is established for one defendant, it is proper for all defendants. While W. Va. Code §56-1-1(c) requires that each plaintiff independently establish proper venue, it is silent as to independent defendants, a point recognized in the majority opinion at Syllabus Point 3, *supra*. Since the Legislature has not addressed the issue of individual defendant venue, that issue is not now before this Court.

[5] The Privileges and Immunities Clause provides, in pertinent part, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

> Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State. *But if a State chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control.*

(Emphasis added.) In *Mayfield*, Justice Frankfurter relied upon Justice Holmes's similar opinion in *Douglas v. New Haven Ry. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1929), for the proposition that a state may preclude non-residents from filing claims in state courts without violating the Privileges and Immunities Clause in certain circumstances. In *Douglas*, Justice Holmes, writing for the Court, noted:

> A distinction of privileges according to residence may be based upon rational considerations[.]...There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.

Douglas, 279 U.S. at 387.[6]

---

[6] In *Douglas*, the Court upheld the constitutionality of a New York statute which provided that "[a]n action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only; ... 4. Where a foreign corporation is doing business within this State." *Id.* at 386. In so doing, the Court rejected an argument that the statute violated the Privileges and Immunities clause by discriminating between citizens of New York and other states by authorizing the dismissal of suits filed by non-citizens of New York but not of those filed by New York citizens.

In both *Mayfield* and *Douglas*, the United States Supreme Court recognized that the need to address an overcrowded court system may be a legitimate, rational basis for discriminating between residents' and non-residents' access to a state court. So long as the West Virginia Legislature provides such a rational basis for discriminating between residents and non-residents when enacting, or revising, a venue statute which prohibits certain suits from being filed in this State by non-residents, it arguably should withstand constitutional scrutiny under the Privileges and Immunities Clause.

Overcrowding of West Virginia courts caused by numerous suits filed by nonresidents against foreign corporations has long been a perceived problem in this State. The Legislature's enactment of W. Va Code § 56-1-1(c) in 2003 was perhaps an effort to address this problem. However, because the Legislature failed to articulate a proper rational basis for discriminating between residents and non-residents for purposes of establishing venue in our courts, this Court cannot now, recognizing the limitations of our Constitutional charge, speculate as to the Legislature's intentions. Without such a proper rational basis for enacting a seemingly discriminatory venue statute, a court left to speculate as to both proper and improper rationales for residency discrimination cannot rightly guess in favor of one possible rationale any more than it can in favor of another.[7]

---

[7] The Legislature might consider setting forth its findings relating to the need for a discriminatory venue section, such as W. Va. Code §56-1-1(c), should it choose to further consider such a venue section in the future.

Albright, J., concurring:

FILED
July 12, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF
APPEALS OF
WEST VIRGINIA

I concur with the reasoning and conclusions in this Court's majority opinion in the instant case. I write separately to amplify several of the points made in that opinion.

A.

The venue provisions of *W.Va. Code*, 56-1-1(c)[2003] that are at issue in the instant case address the ability of a court that has jurisdiction over the person(s) and subject matter of a case to nevertheless abstain from the exercise of that jurisdiction, on venue grounds, when another court is available and more appropriate. The doctrine that permits such an abstention – which can apply in both intrastate and interstate contexts – is known as *forum non conveniens*.[1]

In the interstate application of the *forum non conveniens* doctrine, "the state announcing such a policy disclaims any interest in providing a forum for litigation

---

[1] In their briefs, the parties to the instant case agree that *W.Va. Code*, 56-1-1(c) [2003] addresses *forum non conveniens* principles and procedures in an interstate context, just as earlier parts of the statute address these principles and procedures in an intrastate context. *See State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995). In Syllabus Point 1 of *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co.* 194 W.Va. 203, 460 S.E. 2d 18 (1954) we stated:

> The common law doctrine of forum non conveniens is simply that a court may, in its sound discretion, decline to exercise jurisdiction to promote the convenience of witnesses and the ends of justice, even when jurisdiction and venue are authorized by the letter of a statute.

within the scope of the policy, *i. e.*, litigation between foreigners on causes of action predicated on the laws of another state." Carrie and Schechter, "Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities," 69 Yale Law Journal 1323, 1383 (1960).

A number of courts and commentators have discussed the effect of the Privileges and Immunities Clause of the *United States Constitution* on the exercise of the doctrine of *forum non conveniens*:

> . . . [w]e perceive no reason why the doctrine [*forum non conveniens*] should not be available in this State, upon a proper showing and *without discrimination against either noncitizens of California* or against FELA cases.

Price v. Atchison, T. & S. F. Ry. Co., 42 Cal.2d 577, 581, 583, 268 P.2d 457, 460 (1954) (emphasis added).

> . . . [t]he application of the doctrine [*forum non conveniens*] so as to refuse jurisdiction in an action brought by a citizen of another state will not violate Article 4 *if jurisdiction would also have been refused had the plaintiff been a citizen of the forum state.*

Zurick v. Inman, 221 Tenn. 393, 399, 426 S.W.2d 767, 770 (1968) (emphasis added).

> . . . [M]any courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action brought by a citizen of the forum state in the

> same circumstances. A particular state may apply the doctrine of *forum non conveniens, as long as it is applied to citizens and noncitizens alike.*

Owens Corning v. Carter, 997 S.W.2d 560, 569 (Tex. 1999) (footnote omitted) (emphasis added).

> However, the doctrine [of *forum non conveniens*], as we construe it, is *non-discriminatory* and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residents and citizens as well as for and against foreign residents and citizens.

Gore v. U.S. Steel Corp., 15 NJ. 301, 311, 104 A.2d 670, 675-676 (1954) (emphasis added).

> A state that restricts forum non conveniens to cases involving plaintiffs from other states may run afoul of the Privileges and Immunities Clause of the U.S. Constitution.

Note, "Georgia On the Nonresident Plaintiff's Mind," 36 Ga. L. Rev. 1109, 1142 n.243, (2002).[2]

---

[2] *See also Adkins v. Underwood*, 520 F.2d 890 (7th Cir. 1975) (Illinois Supreme Court did not violate the privileges and immunities clause in view of apparent well-established policy of Illinois courts of allowing nonresident access to Illinois courts and of evenhanded application of *forum non conveniens* doctrine).

In *Norfolk and Western Ry. Co. v. Tsapis*, 184 W.Va. 231, 234-235, 400 S.E.2d 239, 242-243 (1990), this Court stated:

> A number of other courts have reached the same conclusion that the common law doctrine of *forum non conveniens* can be utilized to deny access to courts to nonresident plaintiffs in FELA cases *in appropriate circumstances* without running afoul of the Privileges and Immunities Clause.
>
> * * *
>
> . . . no one factor [is] necessarily dispositive in a *forum non conveniens* analysis and ... the doctrine [has] to be applied flexibly on a case-by-case basis [citing *Piper Aircraft v. Reyno*, 454 U.S. 235, 102, S.Ct. 252, 70 L. Ed. 2d 419 (1991).]

(Emphasis added.)[3]

---

[3] Am. Jur.2d, Constitutional Law, Sec. 769 [2006] states:

> Insofar as such is not prohibited by the Privileges and Immunities Clause, the fact that the parties to an action are noncitizens or nonresidents of the state *may be taken into consideration* by a court in determining whether to apply the doctrine of forum non conveniens, and the application of such doctrine so as to refuse to exercise jurisdiction in an action brought by a citizen of an American sister state is not repugnant to the Privileges and Immunities Clause if, under the particular circumstances, the exercise of jurisdiction would have been refused had the plaintiff been a citizen of the forum state . . . [emphasis added].

"The Supreme Court has permitted nonresidence *to be taken into account* in granting forum non conveniens dismissals[,]" Michael Hoffheimer, "Mississippi Conflicts of Law," 67 Miss. L.J. 175, 321 (1997) (emphasis added).

Based on the foregoing authority (and the authority cited in the majority opinion), it appears that in applying a *forum non conveniens* venue statute like *W. Va. Code*, 56-1-1(c) [2002], it is constitutionally permissible to *take into account* the residency or citizenship of the plaintiff, along with other appropriate factors. However, it is constitutionally impermissible to treat nonresidency in or noncitizenship of West Virginia as a *categorical* ground requiring the courts of West Virginia to dismiss a case on the basis of *forum non conveniens*, without regard to other factors that may be relevant. And of course, the *forum non conveniens* principles simply do not apply where the defendant is a West Virginia entity or the cause of action arose in West Virginia.

B.

This Court's opinion in the instant case correctly concludes that our decision in *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 464 S.E.2d 763 (1995) cannot and does not diminish this Court's duty to assure that all venue-related statutory language is read and applied in a constitutional fashion.

Notably, the *Riffle* opinion did not mention *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 232, 366 S.E.2d 738, 740 (1988), which states:

> Procedural statutes relating to venue, like West Virginia Code § 56-1-1, are effective only as rules of court and are subject to modification, suspension or annulment by rules of procedure promulgated by this Court. *W. Va. Const.* art. 8, § 3; *W.Va. Code* § 51-1-4 (1981 Replacement Vol.); *W.Va. Code* § 51-1-4a (1981 Replacement Vol.). Ultimately, civil venue questions are governed by the procedural rules promulgated by this Court,

> the procedural statutes that are not inconsistent with those procedural rules, and the opinions issued by this Court interpreting those procedural rules and statutes. [Footnote omitted].[4]

Applying this settled principle, this Court recently held that statutory "provisions ... [were] enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as they address procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution." Syllabus Point 3, in part, *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005).

In *Louk*, we stated:

> This Court has made clear that "[t]he legislative, executive, and judicial powers . . . are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]." *Danielley v. City of Princeton*, 113 W.Va. 252, 255, 167 S.E. 620, 622 (1933). Promulgation of rules governing litigation in the courts of this State rests exclusively with this Court.

---

[4] *See also Hinchman v. Gillette*, 217 W.Va. 378, 391, 618 S.E.2d 387, 400 (2005) (Davis, J., concurring) (procedural statutes are effective only as rules of court and are subject to modification, suspension, or annulment by rules of procedure promulgated by this Court).

Id., 218 W.Va. at ___, 622 S.E.2d at 800.[5]

Therefore, it is clear that the Separation of Powers Clause, Art. V, Sec. 1 of the *West Virginia Constitution*, authorizes the substantive review and limitation of statutes in the areas of venue and *forum non conveniens* by the supreme court of appeals insofar as the statutes (1) address procedural litigation matters that are regulated exclusively by the supreme court of appeals pursuant to the Rule-Making Clause, Article VIII, Sec. 3 of the West Virginia Constitution; or (2) present other constitutional concerns.

C.

Finally, it should be noted that the result in each of the cases relied upon by the dissenting opinion in the instant case turns and relies on a purported distinction between non-residents and non-citizens, in applying the Privileges and Immunities Clause. The dissent replicates that distinction by finding that the application of *W.Va. Code*, 56-1-1(c) [2002] in the instant case to dismiss Mr. Morris' case is constitutionally permissible, because this West Virginia

---

[5] *See also* Syllabus Point 1, *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) ("Under Article VIII, Section 8 of the Constitution of West Virginia . . . administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); *Williams v. Cummings*, 191 W.Va. 370, 372, 445 S.E.2d 757, 759 (1994) ("This statute . . . is in conflict with and superseded by T.C.R. XVII, which addresses the disqualification and temporary assignment of judges, and thereby dispenses with [the statute] . . .;" *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 184 W.Va. 75, 79 n.4, 399 S.E.2d 657 n.4 (1990) ("We note that the procedural statutes relating to venue are effective only as rules of court and subject to modification, suspension, or annulment by rules of procedure promulgated by the Supreme Court.") (citation omitted).

statute facially applies to both citizen and non-citizen "nonresidents."[6]

As this Court's opinion makes clear at note 2, the notion that there is a substantial and dispositive constitutional distinction between discrimination on the basis of residency and discrimination on the basis of citizenship has been set aside by a series of decisions by the United States Supreme Court. Authority grounded in this obsolete distinction is therefore fairly unpersuasive; and it seems that any discriminatory scheme, whether against non-residents or non-citizens, is of constitutional dimension and must be measured against a standard higher than a "rational basis." A court's ability to "take into account" the residency of a plaintiff in a true *forum non conveniens* situation, which I believe is permissible, is more respecting of the constitutional values at stake than any categorical discrimination.

Accordingly, I concur with this Court's opinion and judgment.

---

[6] The thoughtful concurrence by Justice Benjamin also cites to *State of Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 3-4, 71 S.Ct. 1, 95 L.Ed. 3 (1950), a case that turns on a distinction between discrimination against "citizens" of other states and discrimination against "residents" of other states.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

CIVIL ACTION NO. 04-C-1174

CROWN EQUIPMENT CORP.,
a foreign corporation and
JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
a West Virginia corporation,

FILED
2004 SEP-1 PM 1:04

Defendants.

CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

Came this 1st day of September, 2004, Crown Equipment Corp. ("Crown"), by its counsel, Michael J. Farrell and Farrell, Farrell & Farrell, L.C. and came also plaintiff by Thomas W. Pettit and presented oral argument in support of its Motion to Dismiss for Lack of Venue. The Motion was filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code 56-1-1(c).

The Court has considered the argument of counsel at the Hearing on this Motion, the applicable law as well as the allegations in the Complaint, proposed Amended Complaint, and the statements in Plaintiff's Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order and Plaintiff's Amended Response to Defendants' Crown and Jefferds Motions to Dismiss and Crown's Motion for a Protective Order.

Findings of Fact

1. This civil action was filed after June 4, 2003.

2. At all relevant times, plaintiff is and has been a resident of Virginia.

3. The injury which gives rise to this cause of action occurred in Virginia.

4. Crown is an Ohio corporation with its principal place of business in Ohio.

5. Neither the Complaint nor the proposed Amended Complaint allege that Crown engaged in any acts or omissions within the State of West Virginia which gave rise to the claim.

6. None of the acts or omissions alleged by plaintiff against Crown occurred in the state of West Virginia.

7. There are no facts plead in the Complaint and proposed Amended Complaint that Crown is not subject to jurisdiction within the state of Virginia for the alleged acts or omissions which give rise to plaintiff's cause of action.

8. Plaintiff did not file an affidavit with the Complaint or the proposed Amended Complaint that such action cannot be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Crown.

Conclusions of Law

1. West Virginia Code 56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

2. Because this civil action was filed after June 4, 2003, the applicable venue statute is West Virginia Code 56-1-1(c).

3. Plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code 56-1-1(c).

4. Even if the business contacts of a defendant with the state of West Virginia was relevant to a cause of

action filed by a non-resident of West Virginia, the principal place of business for Crown is Ohio, not West Virginia.

5. West Virginia Code 56-1-1(c) does consider whether the alleged injurious acts or omissions by a defendant occurred within the state of West Virginia. Significantly, plaintiff makes no allegation that any injurious act or omission by Crown occurred in West Virginia.

6. Because there are no allegations in the Complaint or proposed Amended Complaint that all or a substantial part of the acts or omissions attributed to Crown occurred in the state of West Virginia, there is no venue in the Circuit Court of Kanawha County, West Virginia for this non-resident plaintiff to pursue a cause of action against Crown as contemplated by West Virginia Code 56-1-1(c).

7. Venue in the Circuit Court of Kanawha County, West Virginia must be established against each defendant on the face of the Complaint or the proposed Amended Complaint.

8. Venue in the Circuit Court of Kanawha County, West Virginia is not established as to Crown on the face of the Complaint or the proposed Amended Complaint.

9. Venue for civil litigation in West Virginia is defined by statute.

10. The allegations in the Complaint and proposed Amended Complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code 56-1-1(c).

11. West Virginia Code 56-1-1(c) expressly provides that dismissal in this circumstance is without prejudice to re-filing in a court in any other state or jurisdiction.

12. The Motion to Dismiss by Crown, based on Rule 12(b)(3), W.Va. R. Civ. Proc. And West Virginia Code 56-1-1(c), is ripe for decision.

13. Both West Virginia Code 56-1-1(c) and Rule 12 (b) (3), W. Va. R. Civ. Proc. Expressly provide that dismissal is the proper remedy when venue is not proper as to a non-resident plaintiff.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted against Crown Equipment Corp. be and are hereby **DISMISSED WITHOUT PREJUDICE** to re-filing in a court in any other state or jurisdiction as provided by West Virginia Code 56-1-1(c).

2. The Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

Thomas W. Pettit, Esquire
Thomas W. Pettit, L.C.
Post Office Box 189
Barboursville, West Virginia 25504

Michael J. Farrell, Esq.
Robert L. Hogan, Esq.
Farrell, Farrell & Farrell
Post Office Box 6457
Huntington, West Virginia 25772-6457

Thomas J. Cullen, Esq.
Adam T. Sampson, Esq.
Goodell, DeVries, Leech & Dann
One South Street, 20th Floor
Baltimore, Maryland 21202

Lawrence E. Morhous, Esq.
Brewster, Morhous, Cameron, Mullins, Caruth, Moore, Kersey & Stafford

Post Office Box 529
Bluefield, West Virginia 24701

3. The objections and exceptions of plaintiff are noted and preserved.

ENTERED:

s/Tod J. Kaufman
Tod J. Kaufman
Judge

DATED: September 1, 2004

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1 DAY OF SEPTEMBER 2004.
s/Cathy s. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. CIVIL ACTION NO. 04-C-1174
(Judge Tod J. Kaufman)

CROWN EQUIPMENT CORP., a foreign corporation; and JEFFERDS CORP., d/b/a HOMESTEAD MATERIALS HANDLING COMPANY, a West Virginia corporation,

Defendants.

FILED
2004 NOV 24 PM 1:17

CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER

On the 1st day of September, 2004, and on the 12th day of November, 2004, came Jefferds Corp. by its counsel, Lawrence E. Morhous, and also came plaintiff by his counsel, Thomas W. Pettit, and presented oral argument on Jefferds Corp.'s motion to dismiss for lack of venue filed pursuant to Rule 12(b)(3), West Virginia Rules of Civil Procedure and West Virginia Code §56-1--1(c) and plaintiff's response to that motion coupled with his motion to amend his complaint.

The Court, having considered the argument of counsel on the motions, the applicable law, the allegations in plaintiff's complaint and proposed amended complaint,

plaintiff's response to that motion, and the affidavit in support of the dismissal motion filed by Jefferds Corp., does rule as follows:

Findings of Fact

1. That this civil action was filed after June 4, 2003.

2. That at all times relevant to this action, plaintiff is and has been a resident of the Commonwealth of Virginia.

3. That the injury giving rise to this action occurred in the Commonwealth of Virginia.

4. That even though Jefferds Corp. is a West Virginia corporation and some of its officers may reside in Kanawha County, plaintiff has failed to produce any fact to establish that "all or a substantial part of **(any) acts or omissions giving rise to (plaintiff's) claim**" (emphasis added) occurred within the State of West Virginia as mandated by Code §56-1--1(c).

5. That plaintiff did not file an affidavit with his complaint, his proposed amended complaint, or otherwise to demonstrate that his claims could not be maintained in Virginia due to the lack of any legal basis to obtain personal jurisdiction over Jefferds Corp. as required in situations of this nature by Code §56-1--1(c).

Conclusions of Law

1. That venue for civil litigation in West Virginia is defined by statute.

2. That West Virginia Code §56-1-1(c) is applicable to all civil actions filed after June 4, 2003.

3. That since this action was filed after June 4, 2003, the applicable venue statute is West Virginia Code §56-1-1(c).

4. That plaintiff is a non-resident of the state of West Virginia as contemplated by West Virginia Code §56-1-1(c).

5. That West Virginia Code §56-1-1(c) does not differentiate as to whether a domestic or foreign entity is accused of injurious acts or omissions by a plaintiff but instead that statute requires that all or a substantial part of any such acts or omissions occur within the state of West Virginia and, more pertinent to this action, that such acts or omissions must have given rise to plaintiff's claims and thus neither the residency of the officers of Jefferds Corp. in West Virginia nor that company's operation of branch facilities in different states including Virginia and West Virginia as argued by plaintiff's counsel in opposition to Jefferds Corp.'s dismissal motion is not relevant to a determination of proper venue under that statute.

6. That because there is a complete absence of any proof that all or a substantial part of any acts or omissions giving rise to plaintiff's claims against Jefferds Corp. in this action occurred in the state of West Virginia and there being no credible proof presented by plaintiff to rebut any of the assertions set forth in the affidavit of J. David Sorrells submitted in support of Jefferds Corp.'s dismissal motion, there is no venue in this Court.

7. That plaintiff's allegations in his complaint and proposed amended complaint provide no factual or legal basis to disregard the deliberate choice by the West Virginia Legislature to exercise its right to define the venue for the Circuit Courts of this state as set forth in West Virginia Code §56-1-1(c) so as to protect not only those Courts but also the citizens of this State, including corporations such as Jefferds Corp. from claims of non-resident plaintiffs

8. That West Virginia Code §56-1-1(c) expressly provides that a dismissal in this circumstance must be without prejudice to the re-filing of a plaintiff's claims in a court in any other state or jurisdiction.

9. That both West Virginia Code §56-1-1(c) and Rule 12(b)(3) of the West Virginia Rules of Civil Procedure provide that dismissal of a civil action is the appropriate remedy when venue is not proper.

WHEREFORE, IT IS ADJUDGED, ORDERED AND DECREED that:

1. All claims and causes of action asserted by plaintiff against Jefferds Corp. be, and they hereby are, **DISMISSED BUT WITHOUT PREJUDICE** to plaintiff re-filing his claims in a court in any other state or jurisdiction as contemplated by West Virginia Code §56-1-1(c).

2. The objections and exceptions of plaintiff to the rulings in this Order are hereby noted and preserved.

THE CLERK IS HEREBY INSTRUCTED TO MAIL AN ATTESTED COPY OF THIS ORDER TO EACH OF THE UNDERSIGNED ATTORNEYS IMMEDIATELY FOLLOWING THE ENTRY HEREOF.

ENTER: This 24th day of November, 2004.

s/T.J. Kaufman
Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24 DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson _____ CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMIAH "BART" MORRIS,

Plaintiff,

v. Civil Action No. **04-C-1174**
Tod Kaufman, Circuit Judge

CROWN EQUIPMENT CORP., a foreign corporation; and JEFFERDS CORP. D/B/A HOMESTEAD MATERIALS HANDLING COMPANY, a West Virginia corporation,

Defendants.

FILED
2004 NOV 29 AM 11:27
CATHY S. GATSON, CLERK
KANAWHA CTY. CIRCUIT COURT

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

On the 12th day of November, 2004, came the parties, by their respective counsel, for hearing upon *Plaintiff's Motion to Reconsider*.

Whereupon the Court, having reviewed the written submissions of the parties, heard the oral arguments of counsel as to *Plaintiff's Motion to Reconsider*, which the Court concludes should be treated as a motion filed pursuant to W.Va. R. Civ. P. Rule 59(e). Having fully considered the same, the Court is of the opinion that Plaintiff's Motion to Reconsider should be **DENIED**, based upon the following findings and conclusions.

In resolving *Plaintiff's Motion to Reconsider*, the Court adopts all findings and conclusions set forth in its

Order entered herein on September 1, 2004, as if fully restated herein. The Court further finds and concludes as follows.

1. West Virginia Code § 56-1-1(c) was enacted by an Act of the West Virginia Legislature in 2003.

2. The legislative history of Senate Bill No. 213 (2003), which lead to enactment of W.Va. Code § 56-1-1(c)(2003), indicates that he purpose of the Bill was "to preserve West Virginia courts for West Virginians and for non-residents who are injured in this state," a compelling state interest.

3. In passing Senate Bill No. 213, the Legislature is presumed to have known and understood the pre-existing W.Va. Code § 56-1-1. It may be further presumed that the Legislature "meant what it said" in the text of W.Va. Code § 56-1-1(c)(2003). *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, 585-86, 466 S.E.2d 424, 436-37 (1995).

4. Whereas paragraphs (a) and (b) of the pre-existing W.Va. Code § 56-1-1 reference terms such as "civil action" and "cause of action," W.Va. Code § 56-1-1(c)(2003) introduces a new, singular term, "claim"; i.e., ". . .unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." The Court therefore concludes that the Legislature intended that the term "claim," as used in W.Va. Code § 56-1-1(c), should have a different meaning than "cause of action" or "civil action."

5. The Court concludes that the use of the term "claim," when viewed in the context of the express purpose of W.Va. Code § 56-1-1(c), reflects the Legislature's intent that a non-resident of West Virginia who was not injured in West Virginia must establish venue as to each claim asserted, and consequently, as to each defendant against whom each claim is asserted. Had the Legislature's intent been otherwise, the Legislature would have expressly stated or used the same terminology found in W.Va. Code § 56-1-1, paragraphs (a) and (b).

6. The *West Virginia Rules of Civil Procedure* are not to be construed so as to extend or limit venue. W.Va. R. Civ. P. Rule 82. Consequently, the joinder rules set forth in W. Va. R. Civ. P. Rules 19 and 20 have no impact on the Court's determination of venue in this instance. Moreover, to the extent that the joinder rules may be intended to promote judicial economy and avoid piecemeal litigation, such goals would have been most appropriately pursued in this instance had the plaintiff prosecuted his claims in the courts of the Commonwealth of Virginia.

7. There is no conflict between W.Va. Code § 56-1-1(c) and W. Va. Code § 56-3-33(a)(4)-(5). The latter statute, which provides for "long-arm" jurisdiction, is applicable to injuries caused in West Virginia by conduct outside the State. In this instance, plaintiff's injuries occurred in Virginia, not West Virginia, and therefore, W.Va. Code § 56-3-33(a)(4)-(5) is inapplicable. Furthermore, jurisdiction and venue are distinct concepts, and each must be independently established by a plaintiff seeking to prosecute a claim against a defendant.

Therefore, for the reasons set forth above and in this Court's September 1, 2004 *Order* dismissing all claims against defendant Crown Equipment Corporation, without prejudice, it is accordingly **ORDERED** that *Plaintiff's Motion to Reconsider* shall be and is hereby **DENIED**.

There being no just reason for further delay in the disposition of plaintiff's claims against Crown, it is further **ORDERED** that the prior dismissal of claims against Crown, without prejudice, together with this denial of *Plaintiff's Motion to Reconsider*, shall constitute a **FINAL JUDGMENT** as between plaintiff and Crown, as contemplated by W.Va. R. Civ. P. Rule 54(e).

It is further **ORDERED** that the Clerk of Court shall provide a *teste* copy of this Order to counsel of record as follows:

Thomas W. Pettit, Esquire
THOMAS W. PETTIT, L.C.
P.O. Box 189
Barboursville, WV 25504

Michael J. Farrell, Esquire
Robert L. Hogan, Esquire
FARRELL, FARRELL & FARRELL, L.C.
P.O. Box 6457
Huntington, WV 25772-6457

Thomas J. Cullen, Esquire
Adam T. Sampson, Esquire
GOODELL, DeVRIES, LEECH & DANN, LLP
One South Street, 20th Floor
Baltimore, MD 21202

Lawrence E. Morhous, Esquire
BREWSTER, MORHOUS, CAMERON MULLINS,
CARUTH, MOORE, KERSEY & STAFFORD, PLLC
P.O. Box 529
Bluefield, WV 24701

The objections and exceptions of plaintiff are noted and preserved.

ENTER: 11/29/04

s/Tod J. Kaufman
Tod J. Kaufman, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY

FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30th DAY OF NOVEMBER 2004.
s/ Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Prepared for entry by:

s/Robert L. Hogan
Michael J. Farrell, WVSB # 1168
Robert L. Hogan, WVSB # 5979
FARRELL, FARRELL & FARRELL, L.C.
P.O. Box 6457
Huntington, WV 25772-6457
Telephone: (304) 522-9100
Facsimile: (304) 522-9162

-- *And* --

Thomas J. Cullen, *admitted pro hac vice*
Adam T. Sampson, *admitted pro hac vice*
GOODELL, DeVRIES, LEECH & DANN LLP
One South Street, 20th Floor
Baltimore, MD 21202
Telephone: (410) 783-4000
Facsimile: (410) 783-4040
Attorneys for Crown Equipment Corporation

Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

JEFFERDS CORPORATION and
CROWN EQUIPMENT CORPORATION,
Petitioners,

v.

JEREMIAH "BART" MORRIS,
Respondent.

On Petition for a Writ of Certiorari to the
West Virginia Supreme Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ALLISON M. ZIEVE
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

JOHN COOPER
Counsel of Record
Cooper, Preston & Douglas
333 2nd Street
Parsons, WV 26287
(304) 478-4600

Counsel for Respondent

November 2006

QUESTION PRESENTED

Whether West Virginia's venue statute, W. Va. Code § 56-1-1, requires a West Virginia state court to decline to exercise jurisdiction over a case brought by a non-resident plaintiff against a West Virginia resident.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. This Court Lacks Jurisdiction To Review The Non-Final Decision Below 3

B. The West Virginia Supreme Court Of Appeals Articulated Independent State Grounds For Its Decision 6

C. No Conflict Exists Among The State High Courts On The Issue Decided Below 6

1. Petitioners' reliance on forum non conveniens cases is misplaced 7

2. The cases Petitioners cite involving venue statutes do not conflict with the judgment below 10

D. The Decision Below Is Consistent With Supreme Court Jurisprudence 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES Pages

Baltimore & Ohio Railroad Co. v. Ballie,
148 N.E. 233 (Ohio 1925) 11

Belknap v. Hale,
463 U.S. 491 (1983) 5

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 3, 4, 5

Douglas v. New York, New Haven & Hartford Railroad Co.,
279 U.S. 377 (1929) 11, 12

Flynt v. Ohio,
451 U.S. 619 (1981) 5

Gober v. Federal Life Insurance Co.,
237 N.W. 32 (Mich. 1931) 10

Gore v. United States Steel Corp.,
104 A.2d 670 (N.J. 1954) 7, 9

Grovey v. Washington National Insurance Co.,
119 S.W.2d 503 (Ark. 1938) 9

Harvey v. Eastman Kodak Co.,
610 S.W.2d 582 (Ark. 1981) 9

Jefferson v. City of Tarrant,
522 U.S. 75 (1997) 3, 4

Loftus v. Pennsylvania Railroad Co.,
140 N.E. 94 (Ohio 1923) 10

Missouri ex rel. Southern Railway Co. v. Mayfield,
340 U.S. 1 (1950) 12

Mooney v. Denver & Rio Grande Western Railroad Co.,
221 P.2d 628 (Utah 1950) 7

Owens Corning v. Carter,
997 S.W.2d 560 (Tex. 1999) 11

Rosenthal v. Unarco Industries,
297 S.E.2d 638 (S.C. 1982) 10

Southland Corp. v. Keating,
465 U.S. 1 (1984) 5

Walker v. Ohio River Co.,
205 A.2d 43 (Pa. 1964) 9

Westerby v. Johns-Manville Corp.,
32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982) 9

STATUTES

28 U.S.C. § 1257(a) 3

W. Va. Code § 56-1-1(a) 1, 2, 5, 6

W. Va. Code § 56-1-1(c) 1, 2, 4, 5, 6, 10

STATEMENT OF THE CASE

While operating a forklift that went out of control, respondent Jeremiah "Bart" Morris suffered a severe injury that required amputation of his leg. Mr. Morris is a Virginia resident, and the incident occurred in Virginia.

Petitioner Jefferds Corporation ("Jefferds"), a West Virginia Corporation, is the distributor of the forklift and responsible for servicing the product. Petitioner Crown Equipment Company ("Crown"), an Ohio corporation, designed, manufactured, and distributed the forklift. Mr. Morris sued Petitioners in state court in West Virginia, where Jefferds is incorporated and has its principal place of business and where its officers reside. The complaint alleges negligence, strict liability, failure to warn, and breach of warranty.

Both Jefferds and Crown moved to dismiss for improper venue based on a West Virginia statute, W. Va. Code § 56-1-1(c) (2003), which, in pertinent part, provides: "[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."

In response to the motions to dismiss, Mr. Morris argued that application of § 56-1-1(c) as urged by Petitioners would violate the Privileges and Immunities Clause of the United States Constitution, that their argument ran counter to the Open Courts Clause of the West Virginia Constitution, that venue was proper under W. Va. Code § 56-1-1(a) because Jefferds is a West Virginia corporation, and that venue was proper under § 56-1-1(c) because "a substantial part of the acts or omissions giving rise to the claim asserted occurred in" West Virginia. Mr. Morris also moved to amend his complaint and to take discovery limited to venue issues.

The trial court denied Mr. Morris's motions and granted Petitioners' motions to dismiss. Mr. Morris appealed to the

state Supreme Court of Appeals, which reversed and remanded the case to the trial court for proceedings on the merits. The court explained that a reading of W. Va. Code § 56-1-1(c) that "categorically immunize[d] a West Virginia defendant . . . from suit in West Virginia by a nonresident" would run afoul of the Privileges and Immunities Clause and "established West Virginia law." Jefferds App. 19. The court therefore gave a "narrow-breadth reading" to the state statute and held that § 56-1-1-(c) does not apply to civil actions filed against West Virginia citizens and residents, such as Jefferds. *Id.* 20-21. The court therefore did not reach the state constitutional issue. The court also did not decide whether "a substantial part of the acts or omissions involved" occurred in West Virginia, although the majority stated that "it seems clear that the plaintiff's Second Amended Complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to Morris' claims occurred in West Virginia." *Id.* 11-12.[1]

In a concurrence, Justice Benjamin stated that the case should be remanded to resolve factual questions about "whether 'all or a substantial part of the acts or omissions giving rise to the claim occurred in'" West Virginia. *Id.* 31 (quoting § 56-1-19(c)); *see id.* 35 (same). He also stated that venue was proper under W. Va. Code § 56-1-1(a), based on the residence of Jefferds's officers. *Id.* 34. Justice Albright concurred to emphasize that residency may be taken into consideration along with other factors in a forum non conveniens context, but that

---

[1]The court also held that, under state law, venue was proper as to petitioner Crown because "once venue is proper for one defendant, it is proper for all other defendants subject to process." Jefferds App. 22-25. Crown has not sought this Court's review of this state-law holding.

it should not be used as a "categorical ground requiring" dismissal. *Id.* 43. Justice Maynard dissented. *Id.* 26.

REASONS FOR DENYING THE WRIT

Review is unwarranted for four reasons. First, the court lacks jurisdiction because the state court decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Second, the decision below rests on independent state grounds. Third, there is no conflict among the state courts regarding the question presented here. Finally, the decision below is not inconsistent with this Court's jurisprudence.

A. This Court Lacks Jurisdiction To Review The Non-final Decision Below.

This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the West Virginia Supreme Court of Appeals reversed the trial court's dismissal of the case and remanded the case for further proceedings. Jefferds App. 25. Thus, the decision below is not a "final judgment" within the meaning of § 1257.

This Court has identified four exceptions to § 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 52 U.S. 75, 82 (1997). As to these three categories, the judgment involved here does not even arguably apply. If

Petitioners prevail in the trial court on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. *Id.* at 78. On the other hand, if Petitioners do not prevail on remand, they "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.*

The fourth *Cox Broadcasting* exception applies only when two requirements are met. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

For two reasons, this category is also inapplicable here. First, reversal of the state court decision below would not preclude further litigation on Mr. Morris's claims. As the state supreme court recognized, "it seems clear that [Mr. Morris's] Second Amended complaint does sufficiently allege that a 'substantial' portion of the acts or omissions giving rise to [his] claims occurred in West Virginia." *See* Jefferds App. 11-12 n.4. If the allegations of that complaint are correct, then venue is proper under § 56-1-1(c), regardless of the answer to the question presented in the petitions. *See also id.* 31, 35 (Benjamin, J., concurring) (case should be remanded to resolve factual question whether substantial part of acts or omissions giving rise to the claim occurred in West Virginia). Moreover, as concurring Justice Benjamin observed below, venue in this

case would also be proper under a different provision of the West Virginia Code, § 56-1-1(a), which provides for venue in the West Virginia county where the chief officer of a defendant-corporation resides. Jefferds App. 34; *see id.* at 19 (majority opinion, noting that Petitioners' argument contravenes W. Va. Code § 56-1-19a)).

Second, "refusal immediately to review the state-court decision" presents no risk of "seriously erod[ing] federal policy." No federal policy precludes West Virginia, or any state, from giving its venue statute the reading adopted by the court below. Indeed, Petitioners do not suggest—nor could they—that West Virginia's decision allowing a non-resident to sue a West Virginia resident in West Virginia state court runs afoul of any federal constitutional or statutory right or privilege. Defining the scope of § 56-1-1(c) is well within the province of the West Virginia Supreme Court of Appeals. Because there is no conceivable argument that the scope of that statute, as articulated in the opinion below, violates any federal policy, the fourth *Cox Broadcasting* exception does not confer jurisdiction on this Court here. *See Flynt v. Ohio*, 451 U.S. 619, 621 (1981) ("there is no identifiable federal policy that will suffer if the state . . . proceeding goes forward" in case presenting Equal Protection Clause question). *Compare Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (holding that to allow litigation to go forward where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (holding that to allow case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts); *Cox Broadcasting*, 420 U.S. at 485-87 (holding that delaying review would leave important question regarding freedom of press in "uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press").

In short, because this case does not fit any exception to § 1257's final judgment requirement, this Court lacks jurisdiction to review the decision below.

B. The West Virginia Supreme Court of Appeals Articulated Independent State Grounds For Its Decision.

In this case, the West Virginia Supreme Court of Appeals was asked to construe a state venue law, W. Va. Code § 56-1-1(c). The court held that, because petitioner Jefferds is a West Virginia corporation, "the provisions of W. Va. Code § 56-1-1(c) (2003) do not apply to Morris' suit against Jefferds." Jefferds App. 21.

In choosing to give the West Virginia venue statute a narrow reading, the state court started by discussing its concerns about whether Petitioners' reading of the state law was "constitutionally permissible." It then explained that, "[a]dditionally," Petitioners' reading "would contravene established West Virginia law, including other provisions of W. Va. Code § 56-1-1." Jefferds App. 19 (citing W. Va. Code 56-1-1(a)); *see also id.* 34 (Benjamin, J., concurring). Section 56-1-1(a) provides, in pertinent part, that "venue lies against a domestic corporation doing business in this State wherein its principle office is located, or where its president or principal officer resides." The state supreme court's reading of W. Va. Code § 56-1-1(a), which provides an independent basis for the decision below, presents no question appropriate for this Court's review. Therefore, the petition should be denied.

C. No Conflict Exists Among The State High Courts On The Issue Decided Below.

Below, the court rejected a reading of a state venue statute that would "categorically immunize a West Virginia

defendant" from suit in West Virginia by a nonresident. Jefferds App. 19. Attempting to fashion a conflict worthy of this Court's review, both Petitioners cite cases from various state courts addressing the relationship between the Privileges and Immunities Clause and forum non conveniens doctrine and venue statutes. *See* Jefferds Pet. 18-24; Crown Pet. 12-15. These cases do not conflict with the decision below.

1. Petitioners' reliance on forum non conveniens cases is misplaced.

Unlike the instant case, the majority of the cases cited by Petitioners do not involve venue statutes. Rather, they address the balance of factors that justify discretionary dismissal under the common-law doctrine of forum non conveniens. None of these cases conflicts with the decision below, which considers whether a state statute imposes a categorical bar on suit by out-of-state plaintiffs against in-state defendants.

For example, in *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J. 1954), the New Jersey court construed the forum non conveniens doctrine "not [to] turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice." *Id.* at 675-76. Thus, the court held that an action by or against a nonresident will not "ordinarily" be dismissed, but "only in those exceptional cases where a weighing of all of the many relevant factors" establishes that another forum will be more convenient and better serve the ends of justice. *Id.* at 676. Similarly, in *Mooney v. Denver & Rio Grande Western Railroad Co.*, 221 P.2d 628, 647 (Utah 1950), the court stated: "Granting discretionary power in the trial court to dismiss the cause for reasons of inconvenience, the power should only be exercised in exceptional circumstances and when an adequate showing has been made that the interests of justice require a

trial in a more convenient forum." The court reversed a trial court's forum non conveniens dismissal and remanded for fuller consideration of the facts concerning the convenience of witnesses, costs, the convenience of the court, and the condition of the court calendar in the alternate jurisdiction. *Id.* at 648-49. Thus, the forum non conveniens cases do not pose the question, decided below, whether a state venue statute may impose a strict rule requiring dismissal based on the presence or absence of a specific factor.

Petitioner Crown suggests that the decision below generally rejects the notion of forum non conveniens and runs counter to decisions that apply forum non conveniens doctrine. *See* Crown Pet. 14. That suggestion is wrong. The decision below addresses only the narrow question whether a state statute *requires* dismissal of an action against a state resident when the plaintiff is a nonresident. The court held that West Virginia's venue statutes do not authorize a "categorical" dismissal of such an action. The decision neither states nor implies that forum non conveniens cannot be applied in appropriate circumstances. Indeed, the concurrence of Justice Albright (who also joined the majority opinion in full) emphasizes that nothing in the court's opinion suggests that forum non conveniens may not be applied in appropriate cases to dismiss suits by nonresidents, precisely because forum non conveniens—unlike a categorical venue statute—does not erect a classification that discriminates solely on the basis of state citizenship. Rather, the focus of forum non conveniens is on the convenience of parties, witnesses, and courts, and it may result in the dismissal even of claims brought by residents of a state. Jefferds App. 43. Nothing in the majority opinion is to the contrary, and the contention that the opinion conflicts with decisions upholding the application of forum non conveniens doctrine is therefore unwarranted.

Most of the forum non conveniens cases cited by Petitioners are also irrelevant because they involve cases filed by nonresident plaintiffs against nonresident defendants. All but two of the forum non conveniens cases cited, *Gore*, 104 A.2d 670, and *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982), fall into this category. Asserting the discretionary power to dismiss cases on convenience grounds where the defendant is not a resident of the forum state is a far cry from imposing a mandatory prohibition on suits by nonresident plaintiffs against resident defendants. Indeed, the holdings in *Harvey v. Eastman Kodak Co.*, 610 S.W.2d 582 (Ark. 1981), and *Grovey v. Washington National Insurance Co.*, 119 S.W.2d 503 (Ark. 1938) (both cited in Jefferds Pet. 24), are expressly limited to actions "between nonresidents." *Harvey*, 610 S.W.2d at 585; *see Grovey*, 119 S.W.2d at 504. *Grovey* even distinguishes a situation involving resident defendants. *Id.* at 506.

Aside from *Gore*, discussed above, the only other cited forum non conveniens case involving a resident defendant is from a state trial court in Pennsylvania, *Westerby v. Johns-Manville Corp.*, 32 Pa. D. & C.3d 164 (Pa. Com. Pl. 1982). *Westerby* involved one in-state and several foreign corporate defendants. The trial court held that "Pennsylvania law" did not prohibit dismissal based on forum non conveniens where a Pennsylvania corporation is a defendant. *Id.* at 178. The court explained that flexibility was an important part of forum non conveniens doctrine, which in Pennsylvania derives from case law, not statute. *Id. See also Walker v. Ohio River Co.*, 205 A.2d 43, 46 (Pa. 1964) (Pennsylvania Supreme Court reversing forum non conveniens dismissal, largely because defendant did business in and had principal office in the state). The West Virginia Supreme Court's decision does not conflict with the analysis of the trial court in *Westerby*. Rather, the decision

below expressly rejects Petitioners' reading of West Va. Code § 56-1-1(c) because, rather than allowing the state courts flexibility to balance factors, their reading would treat Mr. Morris's residency as a "categorical bar to his bringing suit in West Virginia against" the resident defendant Jefferds. *See* Jefferds App. 20-21; *id.* 43 (Albright, J., concurring) (permissible to take residency "into account," but impermissible to treat residency as a "*categorical* ground" requiring dismissal without regard to other factors that may be relevant).

2. The cases Petitioners cite involving venue statutes do not conflict with the judgment below.

The petitions cite only two cases involving venue statutes that discriminate against filings by nonresidents: *Rosenthal v. Unarco Industries*, 297 S.E.2d 638 (S.C. 1982); and *Loftus v. Pennsylvania Railroad Co.*, 140 N.E. 94 (Ohio 1923). These cases present no conflict over the Privileges and Immunities Clause that requires resolution by this Court. Indeed, *Rosenthal* does not even discuss the Privileges and Immunities Clause and relies exclusively on South Carolina case law.

Moreover, neither of the two cases involved resident defendants. This distinction is critical because a flat prohibition on a suit by a nonresident against a resident is obviously a much more burdensome discrimination against nonresidents and a much more naked preference for state citizens than a rule permitting dismissal of suits entirely between nonresidents. Suing where a defendant resides is usually the most dependable way of ensuring jurisdiction over the defendant, and a rule prohibiting nonresident plaintiffs from suing state residents is a significant impairment of plaintiffs' access to the courts. *See also Gober v. Federal Life Ins. Co.*, 237 N.W. 32, 33 (Mich.

1931) (although Michigan venue statute seems to restrict suits against nonresidents, "[i]f defendant were a domestic corporation, there would be no doubt of plaintiff's right to sue in this state on her cause of action").

In fact, although both Petitioners rely on *Loftus*, which involved a nonresident defendant, the Ohio Supreme Court later considered a case brought against both a New Jersey corporation doing business in the Ohio county where suit was brought and a railroad company that did not do business in that county. *See Baltimore & Ohio R.R. Co. v. Ballie*, 148 N.E. 233 (Ohio 1925). In *Ballie*, the Ohio court stated that, "admittedly," the case could be maintained against the company that did business in the county. Thus, the decisions of the Ohio Supreme Court are not inconsistent with the holding of the West Virginia court below.

Petitioners also cite *Owens Corning v. Carter*, 997 S.W.2d 560 (Tex. 1999), which concerns a state statute. However, the portion of the opinion on which Petitioners rely does not address a categorical venue statute. Rather, it addresses a forum non conveniens provision that provides for discretionary dismissal based on consideration of a variety of factors. *Id.* at 568 (discussing Tex. Civil Prac. & Rems. Code § 71.051), *cited in* Jefferds Pet. 19-21; Crown Pet. 13. In another part of the opinion, *Owens Corning* discusses a state statute (since repealed) requiring dismissal of certain asbestos claims filed in Texas by nonresidents. Claims dismissed under that provision, however, could be refiled in Texas. *See Owens Corning*, 997 S.W.2d at 580.

D. The Decision Below Is Consistent With Supreme Court Jurisprudence.

Petitioners, focusing on *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 387 (1929), and

Missouri ex rel. Southern Railway Co. v. Mayfield, 340 U.S. 1 (1950), argue that the decision below is wrong under this Court's precedents. Both *Douglas* and *Mayfield* held that application of forum non conveniens to dismiss the case did not contravene the Privileges and Immunities Clause under the facts presented. As is true with regard to most of the state cases cited in the petitions, both of these cases considered dismissal under forum non conveniens doctrine, not a categorical discrimination under a venue statute. In addition, and again as is true with regard to nearly all of the state cases cited, both *Douglas* and *Mayfield* involved out-of-state defendants. *Douglas*, 279 U.S. at 385; *Mayfield*, 340 U.S. at 2-3. Thus, the specific issue decided by the West Virginia court in this case was not presented in those cases. In addition, in contrast to this case, no substantial part of the acts or omissions giving rise to the plaintiff's cause of action occurred in the state where either *Douglas* or *Mayfield* was brought.

Petitioners point to language from these older cases stating that, to comply with the Privileges and Immunities Clause, states may not discriminate between citizens and non-citizens, but they may discriminate between residents and non-residents. The West Virginia Supreme Court was aware of these cases, *see* Jefferds App. 26, 28 (dissent), but based its analysis on this Court's more recent view that "resident" and "citizen" are "essentially interchangeable." *Id.* 8 (quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)); *see also id.* (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208, 216 (1984)). The decision below is fully consistent with the Court's recent cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

John Cooper
Counsel of Record
Cooper, Preston & Douglas
333 2nd Street
Parsons, WV 26287
(304) 478-4600

November 2006

FILED
NOV 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

CROWN EQUIPMENT CORPORATION
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petition for Writ Of Certiorari
To The West Virginia Supreme Court of Appeals

REPLY BRIEF FOR THE PETITIONER

Thomas J. Cullen, Jr.
Renée N. Sewchand
Goodell, DeVries, Leech
& Dann, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
Telephone: (410)783-4000

Michael J. Farrell
Counsel of Record
Robert L. Hogan
Farrell, Farrell, &
Farrell, PLLC
914 Fifth Avenue
P. O. Box 6457
Huntington, WV 25772
Telephone: (304)522-9100

Attorneys for Petitioner, Crown Equipment Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(a) 2

II. THE WEST VIRGINIA HIGH COURT'S HOLDING WAS NOT BASED ON STATE LAW 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976) 2, 3, 4

Burlington Northern Railroad Co. v. Ford, 504 U.S. 648 (1992) 2, 4

Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963) 2, 3

STATUTES

28 U.S.C. § 1257 ..... 2, 3, 4

W. Va. Code 56-1-1(a) (2003) 5

W. Va. Code 56-1-1(c) (2003) 1, 4,5

INTRODUCTION

The underlying action is one in which a Virginia resident, Jeremiah Morris, is seeking damages arising out of a workplace accident in Virginia – an accident regarding which most if not all witnesses and evidence will be located in Virginia. Presumably seeking to avoid Virginia's strict adherence to contributory negligence principles, Mr. Morris brought his claim in West Virginia, which has no substantive nexus to the allegations.

Seeking to preserve its scarce resources for actions with an actual relationship with the State, and to address the perception that it is or will become a magnet for litigation in which it has no interest, the West Virginia Legislature enacted a forum non conveniens statute to preclude venue in cases such as Morris's, which should be heard in another state. See W. Va. Code 56-1-1(c).

However, in a results-oriented, activist opinion, the West Virginia Supreme Court of Appeals struck down these efforts by the Legislature. Misapplying the Privileges and Immunities Act of the U.S. Constitution, the court turned the statute on its head; inconsistent with the plain intent of the Legislature, the statute now not only encourages lawsuits with no nexus with the state, it provides an incentive for non-residents to seek out West Virginia residents to sue in order to exploit a perceived favorable jurisdiction. At the same time, it protects non-West Virginia companies, requiring that additional burdens be met before such a suit may be filed.

Moreover, this decision of the West Virginia high court flies in the face of decades of jurisprudence and legislative policy, from this Court and from other high courts and legislatures throughout the country. Respondent's argument in opposition, while valiant in light of the overwhelming precedent and policy against it, does not change this reality. Accordingly, Petitioner relies on the points made

in its Petition to address those substantive arguments from Respondent.

However, Respondent does raise two new arguments. First, Respondent claims that this Court does not have jurisdiction to hear this matter. Additionally, he argues that the West Virginia high court's ruling was based on state grounds independent of the constitutional basis. As explained further below, neither argument has merit. Respectfully, Petitioner again urges this Court to accept its Petition to affirm the role of the court and to re-establish a thoughtful and constitutional venue statute rightfully created by West Virginia's legislature.

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(a).

Pursuant to Title 28 of the U.S. Code, this Court has jurisdiction to hear appeals from "[f]inal judgments or decrees rendered by the highest court of a State . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States." 28 U.S.C. § 1257(a).

As this Court has held repeatedly, for purposes of § 1257, an opinion regarding venue rendered by a state's highest court is considered a "final judgment[ ]." See Burlington Northern Railroad Co. v. Ford, 504 U.S. 648, 650 n.* (1992) (citing Starnes, infra); American Motorists Ins. Co. v. Starnes, 425 U.S. 637, 642 n.3 (1976) (relying on Langdeau, infra); Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, 558 (1963).

Langdeau, the seminal case governing this jurisdictional issue, involved allegations against two national banks (and others) who were sued in Travis County, Texas based on a venue provision of the state's insurance code. At odds with that state venue provision, however, was a federal

banking statute which established venue as the county where the banks were located - Dallas County. 371 U.S. at 556-57. Prior to trial of the underlying conspiracy and fraud case, the banks sought certiorari regarding which statute governed, thus determining the proper venue for the case. The receiver for the insurance company challenged this Court's jurisdiction on grounds that the ruling of the Texas Supreme Court (that a federal statute could not prohibit suit in a venue expressly allowed by the state venue statute) was not a final judgment. See id. at 557.

Accepting jurisdiction and holding that for purposes of § 1257, the Texas high court's ruling was a final judgment, this Court stated thus:

> [W]e believe that it serves the policy underlying the requirement of finality in 28 U.S.C. s 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id. at 558. Likewise, if this Court waited until after the underlying products liability design defect claim was tried in West Virginia, and thereafter ruled in favor of Petitioner's position that venue is not appropriate in West Virginia, the parties would have been subjected "to long complex litigation . . . all for naught. . . ." Id. Indeed, these factual circumstances present an even stronger argument for early consideration than those in Langdeau, because the resources of two different states are at issue (West Virginia and Virginia, which Petitioner believes is the proper venue).

Moreover, based on Langdeau, this Court has accepted jurisdiction in a directly analogous set of circumstances, where it granted certiorari so that it could determine the constitutionality of a state venue statute. Starnes, 425 U.S. at

642 n.3 (stating that "[f]or the reasons stated in Mercantile Nat. Bank v. Langdeau . . . the judgment presently before the Court is final for purposes of s 1257(2), and holding that the state venue statute did not violate the Equal Protection Clause). Even after the 1988 Amendments to § 1257, the Court has continued to deem rulings governing venue statutes to be final judgments for purposes of the rule. See Ford, 504 U.S. at 650 n.* (stating that "[t]he decision below is final for purposes of 28 U.S.C. § 1257(a)," and upholding the constitutionality of the subject state's venue rules).

Because this Court has determined that rulings affecting venue are final judgments for purposes of 28 U.S.C. § 1257(a), Respondent's arguments regarding the exceptions to § 1257 are of no consequence. It is undisputed that this Court's holding on the constitutionality of West Virginia Code § 56-1-1-(c), the state venue statute, will determine the venue of this case (West Virginia or Virginia). Thus, jurisdiction is appropriate under § 1257(a).

II. THE WEST VIRGINIA HIGH COURT'S HOLDING WAS NOT BASED ON STATE LAW.

The West Virginia high court never wavered in its reasoning that its constitutional analysis formed the sole basis of its opinion. After a lengthy discussion of the Privileges and Immunities Clause, the court expressly held that

> under the Privileges and Immunities Clause of the *United States Constitution*, Art. IV, Sec. 2, the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents.
>
> Applying the foregoing principles to the facts of the instant case, we conclude that the circuit court impermissibly applied *W.Va. Code*, 56-1-1(c) [2003] to treat Mr. Morris'

> nonresidency as a categorical bar to his bringing a suit in West Virginia against Jefferds. Moreover, Jefferds is a West Virginia corporation, and the provisions of *W.Va. Code*, 56-1-1(c) [2003] do not apply to Morris' suit against Jefferds.
>
> Therefore, the circuit court's dismissal of Morris' suit against Jefferds must be reversed.

Crown's App. 20A; Jefferds App. 20-21 (emphasis added). Likewise, the Syllabus by the court identifies the Privileges and Immunities Clause as the basis for the specific ruling being challenged by Petitioner. See Crown's App. 3A; Jefferds App. 3. Based on this plain language, there can be no dispute that the basis of the court's holding was its analysis under the Privileges and Immunities Clause.

Respondent's reference to the West Virginia high court's sole mention of W. Va. Code § 56-1-1(a), notably in a footnote, is merely dicta stated as further support of the court's view that an interpretation of § 56-1-1(c) which categorically barred suits against resident defendants "would contravene the constitutionally permissible scope of the venue statutes in an interstate context." Crown App. 20A; Jefferds App. 19 (emphasis added). Moreover, § 56-1-1(a) governs suits brought by resident plaintiffs and could only be interpreted as inconsistent with § 56-1-1(c) if § 56-1-1(c) were construed as to not apply to resident defendant corporations – the crux of the constitutional debate. See Crown App. 61A-63A (stating § 56-1-1 in its entirety). Such a circular argument would not form an independent basis for a high court ruling, nor would one explained entirely in a footnote. See Crown App.19A n.7; Jefferds App. 19 n.7.

CONCLUSION

For the reasons set forth herein and in its Petition, Crown Equipment Corporation's Petition for Writ of Certiorari must be granted.

Respectfully submitted,

MICHAEL J. FARRELL,
Counsel of Record
ROBERT L. HOGAN
FARRELL, FARRELL, & FARRELL, PLLC
914 Fifth Avenue
P.O. Box 6457
Huntington, WV 25772-6457
Telephone: (304) 522-9100

THOMAS J. CULLEN, JR.
RENÉE N. SEWCHAND
GOODELL, DEVRIES, LEECH & DANN, LLP
One South Street, 20th Floor
Baltimore, Maryland 21202
Telephone: (410) 783-4000

Supreme Court, U.S.
FILED
NOV 20 2006
OFFICE OF THE CLERK

Nos. 06-487, 06-503

IN THE

Supreme Court of the United States

JEFFERDS CORPORATION, D/B/A HOMESTEAD MATERIALS HANDLING COMPANY,
Petitioner,

v.

JEREMIAH "BART" MORRIS,
Respondent.

CROWN EQUIPMENT CORPORATION,
Petitioner,

v.

JEREMIAH "BART" MORRIS
Respondent.

On Petitions for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

---

BRIEF OF AMERICAN CHEMISTRY COUNCIL, AMERICAN INSURANCE ASSOCIATION, CERTAINTEED CORPORATION, THE DOW CHEMICAL COMPANY, MOBIL CORPORATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, OWENS-ILLINOIS, INC., AND UNITED STATES STEEL CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM F. SHEEHAN
FREDERICK C. SCHAFRICK*
PATRICK M. HANLON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001
(202) 346-4000
Counsel for *Amici*
*Counsel of Record

November 20, 2006

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....ii

INTEREST OF THE *AMICI*....1

STATEMENT OF THE CASE....4

A. Before the Enactment of § 56-1-1(c), West Virginia Had Been a "Magnet Jurisdiction" For Mass Tort Claims Brought by Nonresident Plaintiffs....4

B. Section 56-1-1(c) Was Designed To Curb Abusive Forum-Shopping....6

C. The Decision Below....7

ARGUMENT....9

I. THIS COURT HAS JURISDICTION....9

A. The Decision of the West Virginia Supreme Court of Appeals Is Final for Purposes of 28 U.S.C. § 1257(a)....9

B. There Is No Independent and Adequate State Ground....10

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ALLOWING STATES TO CONDITION COURT ACCESS ON RESIDENCY....11

III. THE DECISION BELOW DEFEATS WEST VIRGINIA'S LEGITIMATE EFFORT TO PROTECT ITSELF AGAINST FORUM-SHOPPING ABUSES AND IMPERILS SIMILAR EXISTING OR ANTICIPATED EFFORTS BY OTHER STATES AS WELL....14

CONCLUSION....19

TABLE OF AUTHORITIES

CASES **Page**

3M Co. v. Johnson, 926 So. 2d 860 (Miss. 2006)..... 17

Alden v. Maine, 527 U.S. 706 (1999)..... 13

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 13

American Motorists Ins. Co. v. Starnes, 425 U.S. 637 (1976)..... 9, 10

Austin v. New Hampshire, 420 U.S. 656 (1975) 13

Burlington N. R.R. v. Ford, 504 U.S. 648 (1992) 9, 10

Canadian N. Ry. v. Eggen, 252 U.S. 553 (1920)..... 12

Chambers v. Balt. & O. R.R., 207 U.S. 142 (1907)..... 12

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975)..... 10

Delaware v. Prouse, 440 U.S. 648 (1979) 11

Douglas v. New York, N.H. & H. Ry., 279 U.S. 377 (1929)..... *passim*

Gridley v. State Farm Mut. Auto. Ins. Co., 840 N.E.2d 269 (Ill. 2005)..... 17

Howlett v. Rose, 496 U.S. 356 (1990)..... 13

In re Asbestos Litig., Civ. Action No. 00-Misc.-22, slip op. (Cir. Ct. Kanawha Cty., W. Va., Nov. 8, 2000) 6

Johnson v. Fankell, 520 U.S. 911 (1997)..... 13

Page

Kinney Sys., Inc. v. Continental Ins. Co., 674 So. 2d 86 (Fla. 1996) 17

Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947) 17

Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963) 9, 10

Missouri ex rel. S. Ry. v. Mayfield, 340 U.S. 1 (1950) ..... *passim*

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 4, 6

Owens-Corning v. Carter, 997 S.W.2d 560 (Tex. 1999), *cert. denied*, 528 U.S. 1005 (1999) 16

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 17

Radeljak v. DaimlerChrysler Corp., 719 N.W.2d 40 (Mich. 2006) 17

Stangvik v. Shiley Inc., 819 P.2d 14 (Cal. 1991) 17

State ex rel. Allman v. MacQueen, 551 S.E.2d 369 (W. Va. 2001) 5

State ex rel. Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W. Va. 2002), *cert. den.*, 537 U.S. 944 (2002) . 6

State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793 (W. Va. 2002) 6

Toomer v. Witsell, 334 U.S. 385 (1948) 14

Page

United Bldg. & Const. Trades Council v. Mayor & Council of City of Camden, 465 U.S. 208 (1984) 13, 14

Walker v. Doe, 558 S.E.2d 290 (W. Va. 2001) 11

CONSTITUTIONS:

U.S. Const., art. IV, § 2, cl. 1 ..... 1, 10

W. Va. Const., art. VIII, § 4 10

STATUTES:

28 U.S.C. § 1257(a) 9, 10

28 U.S.C. § 1441(b) 14

Silica Compensation Fairness Act, 2006 Tenn. Pub. Acts, ch. 728 § 9 to be codified at Ten.. Code Ann. § 29-34-308 15

Ala. Code § 6-3-7 16

Ark. Code Ann. § 16-55-213 16

Colo. Rev. Stat. § 13-20-1004(1) 16

Fla. Stat. § 774.205(1) 15

Ga. Code Ann. § 51-14-8 15

735 Ill. Comp. Stat. 5/2-101 16

La. Code Civ. P. art. 123B 16

Page

Mo. Rev. Stat. § 508.010 16

Ohio R. Civ. P. 3(B)(11) 15

S.C. Code Ann. § 15-7-30 16

Tex. Civ. Prac. & Rem. Code Ann. § 71.051 16

W. Va. Code § 56-1-1(a) 8

W. Va. Code § 56-1-1(c) ..... *passim*

RULES AND REGULATIONS:

W. Va. Trial Ct. Rule 26.01(c) 7

OTHER AUTHORITIES:

Stephen J. Carroll et al., *Asbestos Litigation* (Rand Inst. For Civil Justice 2005) 4, 5

U.S. Census Bureau, *Statistical Abstract of the United States*: 2006 (Dec. 2005) 5

West Virginia Court System, 2001 Annual Report, *available at* http://www.state.wv.us/wvsca/presspge.htm 7

West Virginia Court System, 2002 Annual Report, *available at* http://www.state.wv.us/wvsca/presspge.htm 7

West Virginia Court System, 2005 Annual Report, *available at* http://www.state.wv.us/wvsca/presspge.htm 7

INTEREST OF THE *AMICI*[1]

West Virginia Code § 56-1-1(c) is a reform provision designed to curb the long-exercised and well-documented proclivity of nonresident plaintiffs to swamp that State's courts with mass tort claims having little or no factual connection with the forum. The West Virginia Supreme Court has construed the Privileges and Immunities Clause, U.S. Const., art. IV, § 2, cl. 1, to condemn that statute if it is given its plain meaning. Purportedly to save it, the court construed the statute to require West Virginia courts to hear claims brought by nonresident plaintiffs whenever a West Virginia resident is a defendant — even if none of the operative facts occurred in West Virginia. The result in West Virginia is that nonresident plaintiffs may again besiege its courts with claims arising outside of that State so long as they adopt the expedient of naming a West Virginia resident among the defendants. The ancillary result is to cast a cloud over similar existing or contemplated statutes in other states.

The *Amici* are vitally concerned with the preservation of § 56-1-1(c) and similar laws in other States. The *Amici* are companies and organizations with member companies that have a strong interest in ensuring that mass tort claims are litigated both fairly and in the proper forum. Many of the *Amici* (or their member companies) have been defendants in asbestos mass tort litigation in West Virginia where thousands of out-of-state plaintiffs, lured by that State's pro-plaintiff procedures and atmosphere, brought suit

---

[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

even though their claims had no factual connection with the State.

Amicus the American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. The business of chemistry is a $550 billion enterprise and a key element of the Nation's economy. The issue in this case is of direct interest to ACC and its members because asbestos-related actions are often filed in West Virginia courts against ACC member companies even though the plaintiffs in those cases may have little or no contact with the State.

Amicus the American Insurance Association ("AIA") is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files *amicus* briefs in cases before federal and state courts on issues of importance to the insurance industry. The issues in this case are of direct interest to AIA and its members because AIA members are often the liability insurers of companies sued in West Virginia.

Amicus CertainTeed Corporation, headquartered in Valley Forge, Pennsylvania, is a leading manufacturer of a variety of building products, including vinyl and fiber cement siding, vinyl and composite decking, railing and fencing, vinyl windows, residential, commercial and mechanical glass fiber insulation, and residential and commercial roofing, pipe and foundations. CertainTeed has been named as a defendant in several thousand asbestos personal injury lawsuits, including many claims in West Virginia having essentially no connection with that jurisdiction.

Amicus The Dow Chemical Company is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to a wide range of markets that are vital to human progress, including food, transportation, health and medicine, personal and home care, and building and construction. Dow and its affiliated companies have been sued in asbestos and other mass tort litigation, including in West Virginia by plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus Mobil Corporation is wholly owned by ExxonMobil Corporation, the largest publicly owned energy company in the world. Mobil has never produced or marketed asbestos. It is a defendant in many asbestos cases, however, because small amounts of encapsulated asbestos were used as a component in heat-resistant coatings products manufactured by the company between 1963 and 1980. Thousands of asbestos claims have been filed against Mobil in West Virginia, most of which do not involve West Virginia residents and arise out of alleged exposures that took place elsewhere.

Amicus the National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amicus Owens Illinois Inc., a Delaware Corporation with its headquarters in Ohio, is the world's largest manufacturer of glass containers. Between 1948 and

1958, the company manufactured commercial quantities of an asbestos-containing pipe and block insulation in New Jersey. Tens of thousands of asbestos-related personal injury lawsuits have been filed against the company across the country. It appears that many of these cases have been filed in West Virginia by non-resident plaintiffs who have had little or no contact with West Virginia prior to the filing of their lawsuits.

Amicus United States Steel Corporation is an integrated steel producer incorporated in Delaware with corporate headquarters in Pittsburgh, Pennsylvania. Its major steelmaking facilities are located in Indiana, Alabama and Pennsylvania. U S Steel is a defendant in approximately 3,200 active state court asbestos cases. Approximately 90 percent of these cases are filed in "magnet" states that allow or at one time did allow mass filings of asbestos cases with multiple plaintiffs. Over the years, asbestos cases have been filed against U S Steel and new cases are still being filed against U S Steel by non-resident plaintiffs in West Virginia, where U S Steel has no production or office facilities.

STATEMENT OF THE CASE

A. Before the Enactment of § 56-1-1(c), West Virginia Had Been a "Magnet Jurisdiction" For Mass Tort Claims Brought by Nonresident Plaintiffs.

As the Court knows, the "elephantine mass"[2] of asbestos claims filed nationwide is staggering — an estimated 730,000 through 2002.[3] By the mid-1990s, roughly 50,000 new claims were being filed every

---

[2] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

[3] Stephen J. Carroll et al., *Asbestos Litigation*, at 70 (Rand Inst. for Civil Justice 2005) (hereinafter "*Asbestos Litigation*").

year.[4] West Virginia has been one of the forums of choice for these claims — a so-called "magnet jurisdiction." Even though that State has less than one percent of the Nation's population,[5] more than 11 percent of the asbestos personal injury and wrongful death claims filed in state courts between 1988 and 1997 were filed there.[6] In fact, between 1993 and 1997, 7.8% of state court asbestos claims filed nationwide were brought in only two West Virginia counties, Monongalia and Kanawha.[7]

The defendants in these cases were gravely hindered in their ability to defend themselves against this avalanche. Plaintiffs' attorneys filed single complaints for hundreds, even thousands, of plaintiffs against dozens of defendants that provided essentially no information about the claims of any individual plaintiff.[8] The West Virginia courts thereupon consolidated thousands of claims for mass trials — a response that led to confusion about the actual cases set for trial and that actually boomeranged and led to increased filings.[9]

---

[4] *Id.* at 72.

[5] In 2004, West Virginia's population of 1,815,000 represented about 0.6% of the country's total population of 293,655,000. *See* U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, table 21, at 25 (Dec. 2005).

[6] Between 1988 and 1992, 12% of asbestos claims filed in state courts were filed in West Virginia; between 1993 and 1997, the figure was 11%. *Asbestos Litigation*, *supra* note 3, table 3.3, at 62.

[7] *Id.*, table 3.4, at 64.

[8] *See, e.g., Emch v. Owens-Corning Fiberglas Corp.*, Fourth Amended Complaint, No. 95-C-215M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 29, 1996) (complaint named 4,900 plaintiffs and 46 defendants); *Adams v. Owens-Corning Corp.*, Amended Complaint, No. 97-C-22M (W. Va. Cir. Ct. Marshall Cty., filed Mar. 14, 1997) (complaint named 1659 plaintiffs and 49 defendants).

[9] *See State ex rel. Allman v. MacQueen*, 551 S.E.2d 370, 371 & n.1 (W. Va. 2001) (The court estimates that the consolidation plan

The West Virginia courts understood that a majority of these asbestos claims were filed by nonresidents of West Virginia. The concurring justice in *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va.), *cert. denied*, 537 U.S. 944 (2002), an unsuccessful due process challenge to a mass consolidation, observed that "as many as five thousand of the plaintiffs included in the June 24, 2002 mass trial are not West Virginia residents and were never exposed to asbestos in this State. Rather, they have migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation." *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794-95 (W. Va. 2002) (Maynard, J., concurring). In West Virginia, as elsewhere, the overwhelming mass of asbestos cases "defies customary judicial administration." *Ortiz*, 527 U.S. at 821.

B. Section 56-1-1(c) Was Designed To Curb Abusive Forum-Shopping.

The West Virginia Legislature took action in 2003 by enacting W. Va. Code § 56-1-1(c) which provides that, after its effective date, venue will not lie for any suit brought by "a nonresident of the state * * * unless

---

involves "approximately 8,000 asbestos plaintiffs," but adds that it "is uncertain as to the exact number of plaintiffs included in the litigation below."); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va.) (court also "uncertain" as to number of cases, which is estimated to be about 7,715), *cert. denied*, 537 U.S. 944 (2002).

The judge who presided over early consolidations later admitted that they did not eliminate the backlog of cases, but rather simply drew new cases, many of them from out of state: "I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-22, slip op. (Cir. Ct. Kanawha Cty., W. Va., Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state * * *." To provide flexibility, the Legislature provided an exception if the "nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose."

The number of cases filed in West Virginia state courts dropped dramatically after enactment of that provision. In the years 2001 and 2002, an average of 1,850 "mass litigation" civil cases were filed in West Virginia state courts.[10] By 2005 the number had dropped to 57.[11]

C. The Decision Below

West Virginia's effort to control the flood of foreign mass tort litigation is being tested in a less dramatic setting. Respondent Morris is a Virginia resident who sued petitioners in Kanawha County, West Virginia, for an industrial injury occurring in Virginia. The West Virginia Supreme Court of Appeals reversed the trial court's grant of petitioners' motions to dismiss under § 56-1-1(c). Referring to the statute's bar to suit by non-residents, the court held that the "Privileges and Immunities Clause counsels against such discrimination against nonresidents and favoritism and protectionism on behalf of residents." Pet. App. 18.[12] The court then said that a construction of the statute to "categorically immunize a West Virginia defendant like Jefferds from suit in West Virginia by a

---

[10] West Virginia Court System, 2001 Annual Report, table, at 10; West Virginia Court System, 2002 Annual Report, table, at 10. Copies of these reports are available at <http://www.state.wv.us/wvsca/presspge.htm>. The definition of "mass litigation" as used by the West Virginia courts is provided by W. Va. Trial Ct. Rule 26.01(c).

[11] West Virginia Court System, 2005 Annual Report, table, at 16.

[12] All cites to "Pet. App." are to the Jefferds petition in No. 06-487.

nonresident would contravene the constitutionally permissible scope of the [State's] venue statutes" and would also contravene § 56-1-1(a), which provides that "venue lies in suits against domestic corporations doing business in the State." *Id.* at 19 & n.7. The court then noted that it should whenever possible construe a statute so "as to avoid a conflict with the constitution," and concluded: "We therefore hold that *under the Privileges and Immunities Clause* * * * [§] 56-1-1(c) * * * do[es] not apply to civil actions filed against West Virginia citizens and residents." *Id.* at 20 (emphasis added.).

Next the court noted that, under the venue-giving defendant rule, "once venue is proper for one defendant, it is proper for all other defendants subject to process." *Id.* at 22. The court refused to construe § 56-1-1(c) to disturb that rule and thus require a nonresident plaintiff to establish venue independently for each defendant because such a construction, among other things, would "run[] headlong into the foregoing-discussed constitutional principles that strongly disfavor discrimination on the basis of residency in access to the courts." *Id.* at 25.

Justice Maynard dissented and would have upheld the statute against constitutional challenge. *Id.* at 26. Justice Benjamin agreed with much of Justice Maynard's analysis but concurred in the reversal on the ground that Respondent should have been given an opportunity to amend his complaint to allege facts showing that the acts underlying his claim had occurred in substantial part within West Virginia. *Id.* at 31. Justice Albright concurred with the majority's reasoning and conclusions but wrote separately. *Id.* at 39.

ARGUMENT

This case involves the balance between two competing interests that inhere in our federalism: (a) the right of a State to ensure that the expenditures of its resources (here its judicial resources) benefit its own citizens, and (b) the requirement of interstate equality for citizens of other States mandated by the Privileges and Immunities Clause. Review is warranted because the decision below conflicts with two decisions of this Court on how that balance should be struck when the issue is access to courts. Review is also warranted because, if the decision below is allowed to stand, it will predictably affect thousands of cases in West Virginia and possibly thousands more in other states that have adopted or are considering adopting statutes similar to § 56-1-1(c).

I. THIS COURT HAS JURISDICTION.

A. The Decision of the West Virginia Supreme Court of Appeals Is Final for Purposes of 28 U.S.C. § 1257(a).

The Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a), allowing review of "[f]inal judgments" of the "highest court of a State in which a decision could be had." It might be thought that the decision of the West Virginia Supreme Court of Appeals is not "final" because that court remanded the case for trial. But this Court on three occasions has ruled that the decision of the highest state court on whether federal law supersedes state venue requirements is final for purposes of § 1257(a) even though the case has been remanded for trial. *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Burlington N. R.R. v. Ford*, 504 U.S. 648, 650 n.* (1992); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n. 3 (1976).

As the Court explained in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the decision in such cases rests on two premises. First, the state court's resolution of the impact of federal law on state court venue requirements is a "'separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 483-84 (quoting *Langdeau*, 371 U.S. at 558). Second, it serves the "policy of the federal statute 'to determine now in which state court [petitioners] may be tried rather than to subject them * * * to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.'" *Id.* at 484 (quoting *Langdeau*, 371 U.S. at 558).

Accordingly, under *Langdeau*, *Ford*, and *Starnes* the decision below is final for purpose of § 1257(a).

B. There Is No Independent and Adequate State Ground.

That the West Virginia Supreme Court of Appeals purported to construe the state venue statute at issue so as to harmonize it with that court's interpretation of the Privileges and Immunities Clause does not mean that the decision below rests on an adequate state ground so as to deprive this Court of jurisdiction. The West Virginia court ruled that its construction of § 56-1-1(c) was compelled by its understanding of the Privileges and Immunities Clause, as the court-prepared syllabus of its ruling makes this clear: "Under the Privileges and Immunities Clause of the United States Constitution, Art. IV, Sec. 2, the provisions of W. Va. Code, 56-1-1(c) [2003] do not apply to civil actions filed against West Virginia citizens and residents."[13] This Court has repeatedly

---

[13] Pet. App. 3 (syllabus point 2). Article VIII, § 4 of the West Virginia Constitution requires its Supreme Court of Appeals "to

held that it has power to review a state court's decision when the state court "felt compelled by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did". *E.g., Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (citation omitted). That is the situation here.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ALLOWING STATES TO CONDITION COURT ACCESS ON RESIDENCY.

In *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), this Court ruled that Missouri could dismiss a Federal Employee Liabilities Act case that did not arise in that State on the ground of *forum non conveniens*. The Court held: "[I]f a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control." *Id.* at 4 (quoting *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387 (1929)).

In *Douglas*, the Court upheld a New York statute that gave that State's courts discretion to dismiss claims by nonresidents against foreign corporations, ruling: "There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." 279 U.S. at 387. In yet another case, the Court upheld a state statute of limitations that barred suits by nonresidents if the suit was time-barred in the jurisdiction where the action arose, but allowed suits under the same facts when brought by a

---

prepare a syllabus of the points adjudicated in each case in which an opinion is written * * *." *See, e.g., Walker v. Doe*, 558 S.E.2d 290 (W.Va. 2001).

resident. *Canadian N. Ry. v. Eggen*, 252 U.S. 553 (1920).[14]

In sustaining the preferences given residents in those cases, the Court distinguished between state "citizens" and "residents." It construed the statutes at issue to apply equally to all "nonresidents," even if the nonresident happened to be a "citizen" of the forum state, and that equality saved the statutes under the Privileges and Immunities Clause. The same rationale assures the constitutionality of § 56-1-1(c), which may be seen simply to grant preferential access to West Virginia courts to residents of West Virginia over the claims of nonresidents, even if the nonresidents also happen to be citizens of West Virginia.

That, indeed, is the basis on which Justice Maynard dissented below. He would have construed § 56-1-1(c) "to apply to all nonresidents, both citizens and noncitizens of West Virginia" to prevent "a West Virginia citizen who is residing in Ohio * * * and who is injured in Ohio by machinery manufactured by a West Virginia company from suing that company in West Virginia." Pet. App. 29. As Justice Maynard correctly observed: "Such a construction * * * would not offend the Privileges and Immunities Clause" under this Court's decisions in *Mayfield* and *Douglas*. *Id.*

The majority below evidently believed that *Mayfield* and *Douglas* are no longer good law. It said that "[i]t is now established that under the Privileges and Immunities Clause there is ordinarily no difference between discrimination based on a person's 'residence' and discrimination based on a person's 'citizenship,'"

---

[14] *See also Chambers v. Baltimore & O. R.R.*, 207 U.S. 142 (1907), where the Court upheld a state statute that allowed only claims for the wrongful death of one of its citizens on the ground that the statute allowed the wrongful death action to be brought by a personal representative who was a nonresident as well as by a personal representative who was a resident.

and it disparaged cases (without ever actually mentioning *Mayfield* or *Douglas*) that make the distinction between the two, given what it said was "the current irrelevance of that distinction in most cases." Pet. App. 7-8 n.2.

This Court in *United Building & Construction Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984) did say that "the terms 'citizen' and 'resident' are '*essentially* interchangeable' * * * for purposes of analysis of *most cases* under the Privileges and Immunities Clause." *Id.* at 216 (emphasis added; quoting *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975)). But what is "essentially" true for "most cases" is not necessarily or even probably true for cases involving access to state courts. Neither *City of Camden* nor *Austin* overruled *Douglas* or *Mayfield*. On the contrary, both *Douglas* and *Mayfield* were cited with approval by this Court in cases decided after *City of Camden* for the proposition that, "[w]hen a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim." *Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)).[15]

Accordingly, *Douglas* and *Mayfield* are still the law of the land and the West Virginia Supreme Court of Appeals erred in failing to follow them. That error standing alone warrants correction by this Court.[16]

---

[15] *Douglas* was cited even more recently in *Alden v. Maine*, 527 U.S. 706, 801 (1999) (Souter, Stevens, Ginsberg, & Breyer, JJ., dissenting). *Mayfield* has also been cited repeatedly in relatively recent years. *E.g., American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994).

[16] Indeed, even under the *City of Camden* analysis, § 56-1-1(c) is constitutional. As the Court ruled in that case, "the privileges and immunities clause is not an absolute." Rather, discrimination against nonresidents may be justified "where there is a 'substantial

III. THE DECISION BELOW DEFEATS WEST VIRGINIA'S LEGITIMATE EFFORT TO PROTECT ITSELF AGAINST FORUM-SHOPPING ABUSES AND IMPERILS SIMILAR EXISTING OR ANTICIPATED EFFORTS BY OTHER STATES AS WELL.

The immediate result of the decision below is to permit respondent's case to proceed, even though he resides and his injury occurred in Virginia and even though the trial court found that he had "failed to produce any fact to establish that 'all or a substantial part of *(any) acts or omissions giving rise to (plaintiff's) claim*' occurred within the State of West Virginia." Pet. App. 53 (emphasis and parentheticals in original).

The decision also portends a return by West Virginia to its status as a magnet for foreign mass tort claims — just the problem the Legislature was trying to address. Nonresident plaintiffs, who had previously joined a West Virginia defendant to prevent removal to federal court,[17] will find it easy to join a West Virginia resident as a defendant, with the result that West Virginia courts will again be overrun with asbestos or other mass tort cases and § 56-1-1(c) will become a dead letter.

The decision's effect may be equally pernicious beyond West Virginia's borders. Florida, Georgia, Ohio, and Tennessee, for example, have each limited venue in some or all mass tort cases to claims brought by

---

reason' for the difference in treatment" — as where nonresidents are "shown to 'constitute a peculiar source of the evil at which the statute is aimed.'" 465 U.S. at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 396, 398 (1948)). In West Virginia the nonresident plaintiffs are virtually the *entire* source of the evil at which § 56-1-1(c) is aimed. Hence the statute should have been upheld under either a general Privileges and Immunities Clause analysis (*City of Camden*) or under the analysis specifically applicable to statutes restricting access to state courts (*Douglas* and *Mayfield*).

[17] *See* 28 U.S.C. § 1441(b).

their residents or to claims brought by nonresidents who were allegedly exposed in those States.[18] Because it is based on federal constitutional grounds, the decision below places a cloud over those statutes and may well deter other States from enacting similar laws to prevent similar abuses.

Moreover, while the holding below, as reflected in the court's syllabus,[19] is that § 56-1-1(c) may not bar a suit by a nonresident against a West Virginia defendant, its reasoning sweeps more broadly, for the court concluded that "there is a strong constitutional disfavoring of the categorical exclusion of nonresident plaintiffs from a state's courts under venue statutes when a state resident would be permitted to bring a similar suit." Pet. App. 18. That construction of the Privileges and Immunities Clause would require a State to provide a forum for actions between nonresidents that occurred entirely out-of-state so long as a resident of West Virginia could have brought suit under the same facts.

It would therefore call into question a broad array of state statutes that grant preferential access to the claims of state residents over the claims of nonresidents. These statutes provide venue for claims only in the county where plaintiff lives, or where the defendant has its principal office in the State, or where

---

[18] *See* Fla. Stat. § 774.205(1) (limiting venue on asbestos or silica claims to cases where "the plaintiff is domiciled in this state" or where "the exposure to asbestos or silica that is a substantial contributing factor * * * occurred in this state."); Ga. Code Ann. § 51-14-8 (similar limitation to Florida's); Ohio R. Civ. P. 3(B)(11) (limiting venue in asbestos and silica cases to county where all exposed plaintiffs reside or where defendant has its principal place of business); Silica Compensation Fairness Act, 2006 Tenn. Pub. Acts, ch. 728 (2006) (limiting venue on silica claims to actions where "the plaintiff was a resident of Tennessee at the time the claim arose" or where "the claim arose in Tennessee.").

[19] Pet. App. 3 (syllabus point 2).

a substantial part of the events giving rise to the claim occurred. Thus, a non-resident plaintiff may sue a defendant in a state only if the defendant has a principal office there or if a substantial part of the claim arose there, while a resident is not so restricted. Under the principle embraced by the court below, these statutes would appear to contravene the Privileges and Immunities Clause because they provide a forum for claims of residents for certain out-of-state claims but bar such claims by nonresidents.[20]

Other States, such as Texas (a magnet jurisdiction in the 1990s), Colorado, and Louisiana, have enacted statutes requiring or authorizing *forum non conveniens* dismissal of the claims of nonresidents — but not those of residents — if certain conditions are satisfied.[21] These statutes, too, may be in jeopardy if the West Virginia Supreme Court's interpretation of the Privileges and Immunities Clause is correct.[22]

Still other courts have sought to curb abusive forum shopping through the common law of *forum non conveniens*. Thus, earlier this year the Mississippi Supreme Court held that the asbestos claims of nonresidents should have been dismissed for *forum non conveniens*, stating: "The courts of Mississippi will not become the default forum for plaintiffs seeking to

---

[20] *See* Ala. Code § 6-3-7; Ark. Code Ann. § 16-55-213; Mo. Rev. Stat. § 508.010 (venue also proper in county were registered agent of foreign corporation resides); S.C. Code Ann. § 15-7-30. *See also* 735 Ill. Comp. Stat. 5/2-201 (venue proper where a defendant resides or where events occurred).

[21] *See* Tex. Civ. Prac. & Rem. Code Ann. § 71.051; Colo. Rev. Stat. § 13-20-1004(1); La. Code Civ. Proc. art 123B.

[22] In conflict with the decision below, the Texas Supreme Court upheld its statute against a Privileges and Immunities Clause challenge, relying on this Court's decision in *Douglas* "because it has never been overruled by the Supreme Court." *Owens Corning v. Carter*, 997 S.W.2d 560, 571 (Tex.), *cert. denied*, 528 U.S. 1005 (1999).

consolidate mass-tort actions." *3M Co. v. Johnson*, 926 So. 2d 860, ¶ 18 (Miss. 2006). The court held that "less deference should be given to the wholly out-of-state appellees' choice of forum." *Id.* at ¶ 19. *Accord, e.g., Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 277 (Ill. 2005) (dismissing claim against Illinois defendant: "[W]hen the plaintiff is foreign to the chosen forum and when the action giving rise to the litigation did not occur in the chosen forum, the plaintiff's choice of forum is accorded less deference.").

The principle that less deference is accorded to the forum choice of a nonresident is deeply established in the law of *forum non conveniens*. This Court has instructed federal trial courts on the subject,[23] and the principle applies even when the nonresident sues a resident defendant.[24] Yet, if the court below is correct that the Privileges and Immunities Clause requires absolute equality between a resident and a nonresident in providing a forum for suits against a State's residents, then the preference in *forum non conveniens* cases for the claims of a State's residents is also constitutionally infirm.

In the end, whether the States try to deal with abusive forum shopping categorically through venue statutes or through consistent case-by-case application of common law *forum non conveniens* principles, they need to be certain that their efforts do not contravene the Privileges and Immunities Clause. There is not a word in that Clause, nor any indication in the decisions of this Court, that the requirements of the Clause apply differently to statutes that draw bright lines than to judicial decisions that proceed on

---

[23] *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

[24] *E.g., Radeljak v. DaimlerChrysler Corp.*, 719 N.W.2d 40, 43, 48 (Mich. 2006); *Kinney System, Inc. v. Con't. Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996); *Stangvik v. Shiley Inc.*, 819 P.2d 14, 20 (Cal. 1991);

a case-by-case basis. Either absolute equality between residents and non-residents is required, as the court below erroneously held, or it is not.

Amici believe that West Virginia's § 56-1-1(c) is a sensible response, fully consistent with the Privileges and Immunities Clause, to a crisis in its court system caused by mass filings by out-of-state residents. The statute is reasonable and balanced, providing for venue even for non residents if the cause of action arose within the State or if they cannot get jurisdiction over the defendants in another forum. If allowed to stand, the West Virginia Supreme Court of Appeals' contrary conclusion — that the statute is unconstitutional when applied according to its plain terms — will cast a shadow over similar existing statutes in other states and have a chilling effect on still other states seeking to protect their court systems from inundation by mass filings having no connection to the forum. Mass tort litigation can flow in torrents from one state to another, and it is vital to reaffirm the authority of the states in our Federal system to regulate this flow in a reasonable way — as West Virginia has done here.

Accordingly, this Court should grant review to resolve those uncertainties, if not by reaffirming the supremacy of *Douglas* and *Mayfield*, then by clarifying its Privileges and Immunities Clause jurisprudence so that States may have guidance in their efforts to safeguard the quality of justice in their courts.

CONCLUSION

The Court should grant the petitions for certiorari.

Respectfully submitted,

WILLIAM F. SHEEHAN
FREDERICK C. SCHAFRICK*
PATRICK M. HANLON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, D.C. 20001
(202) 346-4000
Counsel for *Amici*

November 20, 2006

*Counsel of Record